Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-337

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM 1974

No. .....

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Jurisdictional Statement

Appellant Francis F. Doran sued herein as Frank Doran, appeals from a judgment of the United States Court of Appeals for the Second Circuit, entered on June 25, 1974, which affirmed the judgment of the United States District Court for the Eastern District of New York, enjoining enforcement of Town of North Hempstead Local Law #1 of 1973, upon the ground that the same was unconstitutional. Appellant submits this statement to show the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The Second Circuit Court of Appeals filed an opinion, with one judge dissenting, which affirmed the opinion of the District Court. *Salem Inn* v. *Frank,* 364 Fed. Supp. 478 (1973).

Jurisdiction

This action was brought by plaintiffs-appelees under the Federal Civil Rights Act of 1871, 42 USC §1932, for a declaratory judgment of the constitutionality and to enjoin enforcement of Local Law #1 of 1973 of the Town of North Hempstead, New York. The law prohibits nude and semi-nude dancing by entertainers, or the presentation thereof by owners of bars, cabarets, discotheques, lounges and dance halls in the territorial jurisdiction of the Town of North Hempstead. Local Law #1 of 1973 was declared unconstitutional by the United States District Court and the enforcement thereof by appellant was enjoined. The Second Circuit Court of Appeals affirmed with one dissent on June 25, 1974.

The appeal to this Court lies under 28 USC § 1254(2) since the Court of Appeals held a state statute invalid as repugnant to the United States Constitution. A municipal ordinance qualifies as a "state statute" under 28 USC § 1254 (2) *Chicago* v. *Aldrison T. & S.F.R. Co.,* 357 U.S. 77, 82 (1958); *United Gas Pipe Line Co.* v. *Ideal Cement Co.,* 369 US 134 (1962); *Stern & Gressman,* Supreme Court Practice 31-32 (1969).

Relevant Provisions of Local Law No. 1 of 1973 of the Town of North Hempstead

TOWN OF NORTH HEMPSTEAD

Local Law No. 1 of 1973

A Local Law Prescribing the Regulation of Cabarets, Bars, Lounges, Dance Halls, Discotheques and Other Public Places in General.

SECTION 1.0—LEGISLATIVE PURPOSE

It is hereby declared the policy of the Town Board of the Town of North Hempstead, County of Nassau, State of New York, that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincorporated area of the Town of North Hempstead, it is necessary to regulate and control the operations of public places used as cabarets, bars or lounges, dance halls, discotheques and other public places in general so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and of persons employed, whether for hire or not, in such establishments.

SECTION 2.0—DEFINITIONS

1. Public Place—Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes: or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term "public place", where used in this law, shall include the term "public assembly" or "assembly" as may be used in other

codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead.

2. Cabaret—Any public place directly or indirectly selling or serving food, drink, or alcoholic beverages to the public and in which any musical entertainment, singing, dancing in a designated area, or other form of amusement is also permitted, and shall include such a room, place, or space which provides incidental musical entertainment by mechanical devices with or without dancing.

3. Bars, Lounges or Discotheques—Any public place in which the business of directly or indirectly selling and/or serving food, drink, or other beverages to the public is conducted and in which any musical entertainment, singing, dancing in a designated area or other form of amusement is also permitted, and shall include such a room, place or space which provides incidental musical entertainment by live musicians or mechanical devices with or without dancing.

4. Dance Halls—Any public place in which dancing is carried on and to which the public may gain admittance either with or without the payment of a fee.

5. Person—An individual, partnership, club, association, corporation, society, or any other organized group of persons and shall include officers, directors, stockholders, partners and trustees of a club, corporation, partnership, association, or society.

6. Town of North Hempstead—The unincorporated area of the Town of North Hempstead, County of Nassau, State of New York.

SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge,

dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. References to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret, bar and/or lounge, dance hall, or discotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any secene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

SECTION 4.0—PENALTY

Any person who shall violate any section of this local law shall be guilty of a violation punishable by a fine not exceeding Five hundred ($500.00) Dollars, or imprisonment for a period not to exceed fifteen (15) days or both. Each day's continued violation shall constitute a separate violation.

SECTION 5.0—EFFECTIVE DATE

This local law shall take effect immediately upon the filing with the Secretary of State.

Dated: Manhasset, New York, June 10, 1973.

BY ORDER OF THE SUPERVISOR AND
THE TOWN BOARD OF THE TOWN OF
NORTH HEMPSTEAD
WILLIAM H. RYAN, JR.
Town Clerk

MICHAEL J. TULLY, JR.
Supervisor

Questions Presented

Whether Local Law #1 of 1973 of the Town of North Hempstead is a valid and constitutional exercise of the police powers of a municipality in furtherance of the public health, safety and welfare.

Whether the federal courts misinterpreted the traditional rules of comity and equity in refusing to abstain from exercising jurisdiction in this case.

Statement of Case

North Hempstead is a town located in northwest Nassau County on Long Island, New York, and has a population of some 242,000 persons. It is adjacent, on its western boundary to the Borough of Queens, City of New York.

On July 10, 1973, after publication of a proposed local law, a public hearing was held and Local Law #1 of 1973 was unanimously adopted by the Town Board and filed with the Secretary of State of the State of New York.

Local Law #1 of 1973 makes it unlawful to offer, present or perform what is commonly known as "topless dancing" in bars, lounges, cabarets, dance halls, discotheques or any public place within the Town of North Hempstead.

Plaintiffs, Salem, Inn Inc., Tim-Rob Bar, Inc. and M & L Rest, Inc. own and operate bars in the Town of North Hempstead in which "topless dancing" is provided as "entertainment" to its patrons. After the effective date of Local Law No. 1 of 1973, the plaintiffs made their "entertainers" wear bikini tops so as to comply with Local Law No. 1 of 1973.

On August 9, 1973, plaintiffs commenced an action for a declaratory judgment and moved by order to show cause for a preliminary injunction and temporary restraining order against enforcement of Local Law No. 1 of 1973 in the United States District Court for the Eastern District. A hearing on the application for a temporary restraining order was held before Judge Dooling on August 14, 1974. Judge Dooling refused to issue a stay of enforcement of Local Law #1 of 1973. Argument on the motion for a preliminary injunction was set for August 17, 1974.

After the complaint in the action for a declaratory judgment was filed, and the request for a temporary restraining order was denied, but before a hearing on the motion plaintiff M & L Rest, Inc. undertook to violate Local Law No. 1 of 1973 by once again providing topless dancing. On August 10, 1974 at 9:25 P.M. the Port Washington Police issued a summons for violation of Local Law No. 1 of 1973 to M & L Rest, Inc., upon the owner thereof and its employees who were dancing.

On September 26, 1973, U.S. District Court rendered its decision holding Local Law No. 1 of 1973 unconstitutionally overboard on its face in the declaratory judgment action and enjoined the enforcement thereof pending further proceedings. Defendant, Frank Doran, appealed to the United States Court of Appeals for the Second Circuit which

rendered its decision on June 26, 1974 affirming the decision of the United States District Court, one judge dissenting.

The Questions Are Substantial

The decision of the Court of Appeals constitutes erroneous application of the existing case law, resulting in an unwarranted expansion of Federal court jurisdiction. The simple issues of valid exercise of local police powers have been confused and hidden by undue complication of the rules of equity and comity. The unwarranted and unnecessary intervention of the Federal District Court, affirmed by the Court of Appeals, is ably stated in Judge Lumbard's dissenting opinion. The Circuit Court of Appeals' refusal to establish a hard and fast rule of federal intervention is juxtaposed by its very establishment of a rule resulting in "a race to the courthouse door".

Since the decisions in *Younger* v. *Harris,* 401 U.S. 37 (1971) and each of its related cases decided by this court left unresolved the question of when federal intervention in state administration of justice or the enforcement of state law is proper, absent pending State criminal proceedings. Federal intervention, long grounded upon rules of equity and comity, thus became the guide of the Circuit Court of Appeals in the resultant, rather novel, albeit simplistic "rule of thumb" in such cases. The Court decided that the court first presented with the issue should retain the cause to disposition.

The issues herein are further complicated by a factual abrogation that, with knowledge of the denial of the temporary restraining order, M & L Rest, Inc. began to violate the unrestrained, presumptively constitutional law. Therefore close scrutiny of the equitable considerations of the Circuit Court of Appeals is necessary to eliminate the further inroads by Federal Courts into State administration of justice.

POINT I

Whether Local Law No. 1 of 1973 is a proper exercise of traditional police powers in furtherance of a legitimate governmental interest.

The threshold issue is whether Local Law No. 1 of 1973 was aimed at a compelling governmental interest that cannot be otherwise achieved, but to burden activity which may contain elements of expression. *U.S.* v. *O'Brien,* 391 U.S. 367 (1968).

Public outcry heard before the Town Board of the Town of North Hempstead, evidenced by the record of the hearing on Local Law No. 1 of 1973 was the basis of the Town Board's entrance into this field of regulation.

While the District Court recognized the Town's police power "can be invoked for the protection of society", the court found Local Law No. 1 of 1973 "inconsistent with the peaceful expression of plaintiffs' constitutionally-protected First Amendment rights." Similarly, the Circuit Court of Appeals, relying upon this Court's decision in *California* v. *La Rue,* 409 U.S. 109 (1972), found an "across the board prohibition". Appellant argued before the District Court and the Circuit Court the prohibition of Local Law No. 1 of 1973 was not an across the board prohibition demonstrated by its narrow legislative intent; to prevent commercial exploitation of nudity. *Crownover* v. *Musick,* 107 *Cal. Rpt.* 681, 509 P2d 497 (1973); *Portland* v. *Derrington,* 253 *Ore* 289, 451 P2d 11 (1969).

Both the District Court and the Circuit Court refused to apply the reasoning of these precedents, or overlooked their import as far as the regulation envisioned by Local Law No. 1 of 1973 was the issue. Rather the Courts below were content with a finding of that which may be protected (i.e. nudity) is afforded protection so absolute that even

that which is not protected is entitled to presumptive protection. This, we submit, is not the law.

Appellant submits that Local Law No. 1 of 1973 should be afforded a presumptive constitutionality. A narrowing delimitation by State Court interpretation of the Local Law No. 1 of 1973, theoretically possible, is made impossible by granting the presumptive protection to the expression rather than to the law.

More importantly, the Courts below overlooked that this Court has never required absolute precision of definitions or applicable scope when considering the constitutionality of local legislation. The Courts below overlooked that legislation is a valid exercise of police power regardless of its failure to precisely define its scope. Precise delineation of which action is a legitimate or illegitimate assumption of power is not dependent upon the scope or coverage of the legislation in question. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

Thus what constitutes the proper subject of local legislation may be the "right thing in the wrong place." 272 U.S. 365, at 387. The validity afforded to legislative enactments, ". . . where bad fades into good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation" is constitutional. 272 U.S. 365, at 388-389. Where the classification is broad so as to be "debatable" the legislative judgment must stand.

These principles precisely applicable in zoning are likewise applicable to any legislation in furtherance of safety, welfare, and protection of the locality. If one may exclude industry from their jurisdictional limits, or nonrelated persons from living as a family in a single dwelling, exclusions of certain defined conduct is proper subject matter of local legislation in furtherance of the same objectives. *Borass* v. *Village of Belle Terre.*

The exclusion of a "pig in the parlor" is a valid exercise of the local police power. *Euclid* v. *Ambler Realty Co., supra.* A basically residential community may under the police power prohibit such conduct that it considers offensive to its well being. These principles were overlooked by the Courts below.

This case mandates further clarification of these rules in relation to local law #1 of 1973. "[E]very line drawn by a legislature leaves something out which might have been included. That exercise of discretion, however, is a legislative function, not a judicial function." *Borass* v. *Village of Belle Terre, supra.*

These rules, we submit, are applicable to this action.

POINT II

Whether the federal courts misinterpreted the traditional rules of comity and equity in refusing to abstain from exercising jurisdiction in this case.

Appellant Frank Doran submits that this case has extended the jurisdiction of the lower Federal Courts far beyond the bounds this Court had defined previously.

This Court had never expressed a definite rule upon which a lower Federal Court could determine the propriety of intervening in vindication of constitutional rights where no prior state action is pending. This Court said:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in the states at the time the federal proceding is begun." *Younger* v. *Harris,* 401 U.S. 37 (1971).

In the case of *Steffel* v. *Thompson, supra,* this court, addressing itself to declaratory judgments determined the propriety of federal intervention where no state prosecution was pending. The Circuit Court, arguing the ap-

plicability of the *Steffel* rationale, relies upon "equitable 'considerations' in favor of extending federal protection . . ." to the plaintiffs. No determination was made in *Steffel* as to the propriety of federal injunctive relief.

Assuming for the purpose of argument that at least two of the three plaintiffs would under the *Steffel* rationale be entitled to invoke federal jurisdiction for the purpose of a declaratory judgment and a preliminary injunction, the Circuit Court extended its protection to a plaintiff who, after the temporary restraining order was denied, violated the Local Law and was, as a result, arrested. No mention of the latter intentional, unequitable or calculated act of violation is mentioned by the majority.

Undertaking to establish a guide for federal court intervention, the Circuit Court established the rule "of which court is first presented with the question seems a clear cut, reliable and equitable guide to which Court should adjudicate the medits." We do not completely disagree. However for at least one of the plaintiffs state processes had begun.

As Judge Lumbard indicated in the dissenting opinion, the rule established by the majority violates the rules of *Younger* v. *Harris, supra,* because:

> "Federal courts should not intervene absent special circumstances. *Younger* v. *Harris,* 401 U. S. 37 at 45 (1971); *Douglas* v. *City of Jeanette,* 319 U. S. 157, (1943)"

and for the reason that plaintiffs had an adequate remedy at law and the federal court should defer to state forums, adequate and capable of insuring plaintiffs' constitutional rights.

The dissent recognized that the appellees failed to demonstrate "special circumstances" as defined by this Court's decisions. The fact that a complaint was filed one day prior to the inception of criminal proceedings while ". . . a useful rule of thumb should hardly be applied as

an absolute rule of law." This, says Judge Lombard, represents ". . . a significant departure from traditional equity practice."

The dissenting Judge recognized the "unseemly races to the federal and state courthouse . . ." No more astute and practical observation could have been made. For, in fact, such is now the state of the law of this Circuit which renders the Town of North Hempstead susceptible to a federal court challenge to each and every legislative enactment it may see fit to undertake.

We submit the rationale of the Courts below render it impossible for the Town of North Hempstead to withstand or defend any constitutional challenge to its legislation. Thus, there is warranted a final determination by this Court establishing the guidelines and presumptions governing such legislation.

Recent decisions of this Court have defined the permissible scope of federal intervention with State processes in vindication of constitutional rights where federal action is commenced during the pendency of State criminal processes. Further definition of the permissible scope of federal injunctive relief where State action is pending or commenced simultaneously with federal action, is required. Such definition would reestablish and define the presumption of constitutionality hitherto afforded local legislation. *Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971); *Steffel* v. *Thompson,* 94 S. Ct. 209 (1974).

A substantial inroad has thus been cut in the traditional rules of equity and comity which would allow an unwarranted interference and upset the well-preserved balance of federal and state jurisdiction. Under the circumstances, the interests of federal-state comity could hardly be served.

Conclusion

The power of the municipality to regulate and control public nudity by enactment aimed at the commercial exploitation of same, has been, and must be continued in the

locality. The decisions of the courts below substantially limit the power under the guise of a constitutional protection of free expression. While the traditional right of free expression is afforded absolute protection, distinctions of conduct-type expression has never been afforded similar protection. The declaration of unconstitutionality of Local Law No. 1 of 1973 fails to recognize this clear legal distinction. The impact is clear and disastrous to the right of the locality to act pursuant to the police powers to protect the health, safety, and welfare of the people.

Procedural uncertainty complicates the issues by rendering every local enactment subject to review by the federal courts if the plaintiff so chooses. The creation of the "rush to the courthouse" rules has far-reaching impact on the presumption of constitutionality afforded to such Local Laws. Such a rule could strip the State courts of the right to review the laws, the interpretation of which is their constitutional duty, and to which they are the more proper initial forum. Similarly, the increased burden which could be created by this "rule of thumb", on the federal forums cannot be overlooked. The rules of equity and comity must be precisely defined and jealously preserved in the interest of our Federal-State system.

The consequences are far-reaching and of substantial importance, and appellant respectfully requests this court note jurisdiction.

Respectfully submitted,

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Appendix A.

Decision of United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 629—September Term, 1973

(Argued March 5, 1974 Decided June 25, 1974)
Docket No. 73-2436

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

Before LUMBARD, OAKES and TIMBERS, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* preliminarily enjoining defendants from prosecuting plaintiffs under Local Law No. 1—1973 of the Town of North Hempstead.

Affirmed.

JOSEPH H. DARAGO, Manhasset, N.Y., *for Appellants.*•

HERBERT S. KASSNER, New York, N.Y. (KASSNER & DETSKY, New York, N.Y.; PAUL E. WARBURGH, JR. of counsel), *for Appellees.*

• Kenneth C. Butterfield, Town Attorney of the Town of Huntington, filed an *amicus curiae* brief for the Town of Huntington urging reversal.

Appendix A.

OAKES, *Circuit Judge:*

This appeal is from the grant of a preliminary injunction by Judge Bartels against the enforcement by the appellants of Local Law No. 1—1973 of the Town of North Hempstead, New York. This ordinance makes it

> unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place, . . . to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering [in other words, "topless"], . . . or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered.[1]

Section 3.0(1), Local Law No. 1—1973, Town of North Hempstead (July 16, 1973). The preliminary injunction was granted at the behest of three different bars, Judge Bartels holding that appellees had sufficiently alleged irreparable harm and that they were likely to succeed on the merits because the ordinance inhibits the full exercise of first amendment freedoms and is overbroad in that "any public place" could include the theater, town hall, opera house, public marketplace, etc., and the ordinance would therefore prohibit performance of a number of works of unquestionable artistic and socially redeeming significance such as the "Ballet Africain," "Hair," and the like.

Appellants argue that the district court should have abstained under *Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971); *Boyle* v. *Landry,* 401 U.S. 77 (1971); *Byrne* v. *Karalexsis,* 401 U.S. 216

Appendix A.

(1971); *Perez* v. *Ledesma,* 401 U.S. 82 (1971); *Dyson* v. *Stein,* 401 U.S. 200 (1971), and that absent bad faith, harassment or other unusual extenuating circumstances federal injunctive relief should not have been granted. They finally argue that on the merits the ordinance is within local police power and therefore not unconstitutional, with the claimed consequence that preliminary injunctive relief should not have been granted as there is no likelihood of appellees' ultimately prevailing on the merits.

We turn to the question whether principles of equity, comity or federalism preclude issuance of a federal injunction restraining enforcement of the North Hempstead ordinance on the basis of its overbreadth pending trial on the merits. To answer this question it is important to understand precisely the situation of the respective appellees at the time the preliminary injunction was sought. The filing of the complaint in this action was instituted immediately after the ordinance became effective. Thereafter an order to show cause why a preliminary injunction should not be granted was signed by Judge Dooling on August 9, 1973. The following day appellee M & L Rest, Inc., which like the other two appellees had covered up its dancers and thereby discontinued topless entertainment, resumed this form of entertainment, and on that day and each of three successive days M & L Rest, Inc., and its dancers were served with criminal summonses for violating the ordinance, a hearing on which was set in the Nassau County Court for September 13, 1973. The preliminary injunction below was granted on September 6, 1973. The other two appellees, Salem Inn, Inc., and Tim-Rob Bar, Inc., had not resumed topless entertainment prior to the grant of the injunction below. As a result of the ordinance and fear of prosecution thereunder they alleged in their complaint supported by affidavits that the exercise by them and by their dancers of first amendment rights had been chilled and their clientele deprived of the right to view con-

stitutionally protected "expression." They claim, as does M & L Rest, Inc., irreparable injury. In each case as a result of requiring the dancers to wear bikini tops the affidavits contain allegations of "a marked diminution of business" or a "substantial curtailment of our business" which "can result in our having to go out of business." The Tim-Rob Bar alleges that there has been a 50 per cent diminution of business. Again, however, only the M & L Rest, Inc., has had its manager and dancers summoned into court.

Initially, in answer to the question of the propriety of the injunctive relief granted here, we agree with the district court as to the probability of success on the merits. Dancing is a form of expression protected by the first amendment. Even nude dancing in a bar can be within the constitutional protection of free expression. *See California* v. *Larue,* 409 U.S. 109, 118 (1972) (Rehnquist, J.).[2] To the extent that this expression is constitutionally protected, the Town may not prohibit it. Thus, in *California* v. *Larue, supra,* where the Court upheld a regulation forbidding the sale of liquor by the drink where sexually provocative entertainment was performed, it was said, "the critical fact is that California has not forbidden these performances across the board." *Id.* It is, however, just such an "across the board" prohibition which Local Law No. 1—1973 enacts. As such the ordinance would have to fall.[3] *See also P.B.I.C., Inc.* v. *Byrne,* 313 F. Supp. 757 (D. Mass. 1970) (three-judge court), *judgment vacated and remanded to consider mootness,* 401 U.S. 987 (1971); *Hogge* v. *Members of City Council,* 482 F.2d 575 (4th Cir. 1973), *cert. denied sub nom. Joseph* v. *Blair,* 42 U.S.L.W. 3593 (U.S. Apr. 22, 1974).

Next, we also agree with this district court as to the irreparable injury facing appellees in the absence of a preliminary injunction. In a most recent decision of this

court, *414 Theater Corp.* v. *Murphy,* No. 73-2327 (2d Cir. May 17, 1974), slip op. 3563, 3571-72, we were faced with a nearly identical claim of irreparable injury. What we said there is applicable here. In short, if the ordinance here with its $500 per day fine were enforced against these appellees, they would be required to continue in business without presenting their form of entertainment (thereby involving a potential deprivation of their and the public's first amendment rights).[4] In that case, they allege, they would also sustain a "substantial loss of business and threatened bankruptcy."[5] Their option—violating the law to exercise their claimed rights and awaiting prosecution in the New York courts—involves its own loss of economic and personal rights. Here as in *414 Theater Corp.* v. *Murphy, supra,* there is sufficient irreparable injury indicated to justify at least the temporary injunction.

We are left then with the question of the applicability of the *Younger* sextet to the preliminary injunction sought here. With respect to appellees Tim-Rob Bar and Salem Inn the *Younger* question is in exactly the same posture as encountered by this court in the recent decision, *414 Theater Corp.* v. *Murphy, supra.* There too we were faced with a federal action for declaratory and injunctive relief against an overbroad ordinance which was alleged to chill first amendment rights and to cause irreparable harm. There too the district court's grant of preliminary relief was before us for review, challenged on the basis that it violated *Younger's* teaching. In *414 Theater* we affirmed the preliminary injunction, in short because the underlying rationale behind *Younger* did not apply when state prosecutions were not pending when the federal actions were brought. *Id.* at 3573-76. *See Steffel* v. *Thompson,* 42 U.S.L.W. 4357, 4360 (U.S. Mar. 20, 1974); *Lake Carriers' Association* v. *MacMullan,* 406 U.S. 498, 509 (1972). Similarly, we find *Younger* inapplicable to Tim-Rob Bar and

Salem Inn here, and accordingly affirm the preliminary injunctions as to them.

M & L Rest, Inc., poses a slightly different problem. While it is equally true that there was no prosecution pending against M & L when the federal action was *begun,* nevertheless we are faced now with a pending state prosecution begun only one day after the federal action was initiated. Reading both *Younger* and *Steffel* strictly would seem to leave the present situation without a clear decision from the Supreme Court. In *Younger* the Court stated explicitly, 401 U.S. at 41 (emphasis added),

> We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts *at the time the federal proceeding is begun.*

Steffel, moreover, which also speaks only to declaratory judgments, clearly is couched in terms of a fact situation where there is no state prosecution pending at the time of the federal consideration on the merits. On the one hand, it might be argued that considerations of comity and federalism would militate in favor of deferring to the pending state prosecution inasmuch as, according to the rationale of *Younger,* the state criminal proceeding is perfectly capable of protecting the constitutional rights of M & L. On the other hand are, it appears to us, more substantial considerations in favor of extending federal protection, at least in this case, to M & L, even though it is subject at this time to a pending state prosecution. One of these considerations is equity. Here M & L, Tim-Rob and Salem Inn all came equally before the federal court invoking its jurisdiction and protection; to grant relief to two plaintiffs and not the third because of *subsequent* events largely out of its control would be most inequitable. This is especially true where the result might be contradictory outcomes. Second, there is an element of conservation of judicial energy in treating M & L along with Tim-Rob and Salem Inn. That is to say, there is little or no greater expenditure of effort to determine the merits as to M & L as well as to the other two, and by doing so the federal court will have relieved the state court of the burden of relitigating the identical issue on identical facts. In a federal system such as ours, how a federal court's abstention will increase or decrease the workload of all the courts—state and federal—is not an improper consideration. Third, we cannot ignore that lower federal courts are the "'*primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Steffel* v. *Thompson,* 42 U.S.L.W. at 4361 (emphasis original), *quoting* Frankfurter & Landis, The Business of the Supreme Court 65 (1928). As such, either in the absence of other considerations or in their equipoise, this consideration would tip the scales in favor of federal rather than state adjudication in the M& L case.

Finally, we are struck by the practical wisdom of having a clear-cut method of determining when federal courts shall defer to state prosecutions, threatened or pending, and when not. Without such a guide uncertainty and inequitable treatment are bound to result with the possibility of an Alphonse-Gaston routine developing between state and federal courts. The fact of which court is first presented with the question seems a clear-cut, reliable, and equitable guide to which court should adjudicate the merits. Generally, this should result in the most speedy disposition of the merits, which is in both the state's here the municipality's, and the private party's interest. While in some cases such a rule may result in the proverbial rush to the courthouse door, it will guard against attempts by state officials to dispossess federal courts of jurisdiction by

initiating suits after the federal action has begun, and similarly guard against attempts to avoid state judgment by inveighing for federal protection after initiation of the state criminal prosecution. The certainty of where the power of adjudication properly lies, moreover, is likely to save all courts substantial time. Upon these considerations then and in light of the facts before us, we find the district court did not err in extending its preliminary injunction to include a prohibition against further prosecution of M & L Rest, Inc., pending a trial on the merits.[6] *Cf. Boraas* v. *Village of Belle Terre,* 476 F.2d 806, 811 (2d Cir. 1973), *rev'd on other grounds,* 42 U.S.L.W. 4475 (U.S. Apr. 1, 1974).

Judgment affirmed.

1. The ordinance's prohibitory section also makes it unlawful for any person to appear with breasts uncovered, etc. Section 3.0(2), Local Law No. 1—1973, Town of North Hempstead, July 16, 1973.

2. Appellants, moreover, have not actually contended that the dancing involved here is obscene.

3. In reaching such a conclusion, we need not determine that the actual dancing involved in appellees' bars is protected expression. At least with respect to first amendment challenges even those litigants whose activities could be properly prohibited in a closely drawn statute may attack an overbroad statute on its face. *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971). *See also Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973). And clearly the ordinance as written here would encompass protected expression within its prohibitions. If pressed on the record before us, moreover, we would tend to find the dancing here protected expression.

First, as noted above, there is no claim that the dancing here was actually obscene. *Compare California* v. *Larue,* 409 U.S. 109, 111 (1972). Second, while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

4. Just the other day the Supreme Court in a censorship case noted that the *reception* of communications was equally protected by the first and fourteenth amendments as its *expression. Procunier* v. *Martinez,* 42 U.S.L.W. 4606, 4610 (U.S. Apr. 29, 1974) (prison mail). In *United States* v. *Cangiano,* 491 F.2d 906 (2d Cir. 1974), *petition for cert. filed,* 42 U.S.L.W. 3596 (U.S. Apr. 11, 1974) (No. 73—1526), the writer pointed out in dissent, *id.* at 915, in a case involving also "freedom of expression and its converse, freedom of consumption of thought or . . . freedom of reception," that one must be careful in making judgments in this area to avoid permitting judgments of taste to become rules of law. 491 F.2d at 914 n. 1. *See* Emerson, The System of Freedom of Expression 492 (1969).

5. The trial court held that "[w]hile this claim has not been established, it has not been denied."

6. It is suggested that the statute is susceptible to a limiting or clarifying construction that would avoid the federal constitutional question so as to make abstention appropriate. The argument is that *Brandon Shores, Inc.* v. *Incorporated Village of Greenwood Lake,* 68 Misc. 2d

343, 325 N.Y.S.2d 957 (Sup. Ct. 1971), gave a similar ordinance, on which Local Law No. 1—1973 was based, a narrowing construction. We do not fathom what that narrowing construction was, however. Justice Cerrato said that the Greenwood Lake ordinance was "anything but vague and indefinite. It clearly sets forth the act to be prohibited, who it applies to, the circumstances under which it applies, and the penalty therefor." 325 N.Y.S.2d at 961. In short, he dealt with the question of vagueness; he never came to the question of overbreadth, the flaw in the ordinance before us. In other words, we are asked to abstain on the sheer speculation that state courts might interpret Local Law No. 1—1973 contrary to its explicit language, thereby removing the constitutional question. Such speculation does not satisfy the "special circumstances" required to make abstention proper. *See Zwickler* v. *Koota*, 389 U.S. 241, 249-52, 254 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 375-78 (1964).

Lumbard, Circuit Judge (dissenting):

I dissent.

Traditional principles of equity, comity, and federalism require that we reverse the district court and permit the pending state criminal prosecution of M & L Rest to proceed.

As Mr. Justice Black emphasized in his opinion for the Supreme Court in *Younger* v. *Harris*, 401 U.S. 37 (1971), even when there is only a threat of state prosecution, a federal court should not intervene absent a showing of "special circumstances," such as bad faith or harassment on the part of state or local officials. 401 U.S. at 45. *See also Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943); *Fenner* v. *Boykin*, 271 U.S. 240 (1926). The reasons for this are two-fold. First, equitable relief traditionally has not been granted where there is an adequate remedy at law. Vindication of constitutional rights in a state criminal

proceeding is deemed an adequate legal remedy. The fact that an individual may be compelled to challenge the constitutionality of a state statute or local ordinance in a state criminal proceeding does not constitute the sort of great and immediate irreparable harm that must be shown before a federal court should consider granting equitable relief. *Ex parte Young*, 209 U.S. 123, 145-47 (1908); *Cameron* v. *Johnson*, 390 U.S. 611 (1968). Second, the overriding interest in federal-state comity and the avoidance of needless friction between the federal and state judicial systems requires that due deference to the state judicial process be shown by the federal courts. The state courts are fully capable of fairly and properly adjudicating suits involving federal rights and should be permitted to do so. *Douglas* v. *City of Jeannette, supra*, 319 U.S. at 163.

Here, plaintiffs have failed to show that they "have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith." *Id.* at 164. No showing of bad faith, harassment, or any other "special circumstances" has been made. Under the circumstances, there is no reason why the federal courts should now intervene to enjoin an on-going prosecution.

It is, of course, true that the federal complaint requesting injunctive relief was filed one day prior to the commencement of the state criminal proceeding, which was only threatened at that time. On this basis, the majority argues that the need to demonstrate "special circumstances" justifying federal equitable intervention is unnecessary. The distinction urged between threatened and pending state prosecutions, while a useful rule of thumb, should hardly be applied as an absolute rule of law. A hard and fast rule based on this distinction would represent a significant departure from traditional federal equity practice, *e.g.*,

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Douglas v. *City of Jeannette, supra,* 319 U.S. 157 (1943), *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935), *Fenner* v. *Boykin, supra,* 271 U.S. 240 (1926), *Ex parte Young, supra,* 209 U.S. 123 (1908). Additionally, it would encourage unseemly races to the federal and state courthouses, with each party seeking to commence its action first. The preservation of the delicate balance between the federal and state courts, a consideration of the utmost significance in our judicial system, *Younger* v. *Harris, supra,* 401 U.S. at 44, would be ill-served by such an approach, which would leave little, if any, room for a careful analysis of the particular, often unique, factors present in each case.

The need for particularized analysis is amply demonstrated by the present case. Here the federal suit was initiated prior to the state prosecution, but by only one day. In their complaint filed in the district court on August 9, 1973, plaintiffs sought a temporary restraining order in addition to a preliminary injunction. While the return date for the motion for a preliminary injunction was set for August 22, thirteen days after the motion was made, the motion for a temporary restraining order against the enforcement of the ordinance in the interim was denied on August 9, the same day it was made and the day before the criminal summons was served on M & L Rest. M & L Rest continued to provide topless entertainment in violation of the local ordinance, although it knew that the federal court, by denial of a temporary restraining order, had explicitly refused to insulate it from state prosecution at least until August 22. The local authorities, too, had reason to believe that at least until the return date for the motion for a preliminary injunction the federal court would not interfere with the enforcement of the ordinance and the prosecution of any violators. When the return date for the motion arrived and an injunction was issued, the

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state prosecution had already commenced. The criminal summons had been served and a hearing date had been scheduled. Under these circumstances, the interests of federal-state comity could hardly be served by now compelling the state to halt its prosecution of M & L Rest pending a federal court determination of the statute's constitutionality.[1]

As for the two other federal plaintiffs, Tim-Rob Bar and Salem Inn, which are not presently subject to criminal prosecution, the suit against M & L Rest may very well be dispositive of their claim.[2] At a minimum, the state courts should be afforded an opportunity to decide the ordinance's constitutionality. This is particularly advisable because it seems likely that the statute in question can be given a narrow, constitutional construction by the state courts. For example, were the statute here interpreted as limited to places in which liquor is served, it could be regarded as a legitimate exercise of the local authorities' police power. *California* v. *LaRue,* 409 U.S. 109 (1972).

In this regard, the majority's reliance on *414 Theater Corp.* v. *Murphy,* No. 73-2327 (2d Cir. May 17, 1974), slip op. 3563 is misplaced. *414 Theater Corp.* in no way com-

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[1] Steffel v. Thompson, 42 U.S.L.W. 4357 (March 19, 1974) is in no way dispositive here. In *Steffel,* the Supreme Court made clear that it was not addressing itself to the questtion of the appropriateness of injunctive relief against threatened and pending state prosecutions. *Id.* at 4360-71.

[2] The majority argues that an approach which would deny M & L Rest resort to the federal court for injunctive relief while allowing it for Salem Inn and Tim-Rob Bar, would work an inequitable result, waste judicial resources, and lead to possibly contradictory decisions on the ordinance's constitutionality. These difficulties may all be avoided if the state courts are first permitted the opportunity to construe the ordinance and determine its constitutionality in the state criminal proceeding against M & L Rest.

pels us to grant the injunctive relief sought here. Indeed, in that case the federal district court initially denied the request for a preliminary injunction "in order to permit the matter to be litigated in the state courts." 360 F. Supp. 34, 35 (S.D.N.Y. 1973). It was only after the state courts had "had ample opportunity to consider the question [of the ordinance's constitutionality] in related cases and [had] declined to do so," *id.* at 36, that 414 Theater Corp. was permitted to renew its petition for injunctive relief in federal court. Moreover, the injunction was finally issued against a background of threatened harassment by local officials who apparently planned to initiate civil suits against 414 Theater Corp. and other peep show operators, despite an unappealed New York City Criminal Court ruling that the ordinance at issue was unconstitutional. At no time did the procedural setting approximate the situation here, where a state prosecution was going forward at the time of the hearing in the federal court, a prosecution which was based on violations occurring during the period in which the federal court had expressly declined to stay the enforcement of the law.

Of course, the plaintiffs here would be free at some later time to seek relief in federal court upon a showing, for example, that the prosecution in the state court was not proceeding with appropriate speed or that the plaintiffs were being harassed. But barring these or other "special circumstances" the proper course would be to raise the constitutional issues in the state criminal proceedings against M & L Rest.

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Opinion and Order of the District Court Eastern District of New York.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-C-1200

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs,

against

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as town attorney of the town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants.

Appearances:

KASSNER & DETSKY, Esqs.
Attorneys for Plaintiffs
PAUL E. WARBURGH, JR., Esq.
Of Counsel

JOSEPH JASPAN, Esq.
County Attorney of Nassau County
Attorney for Defendant Louis J. Frank
LOUIS SCHULTZ, Esq.
Of Counsel

JOSEPH H. DARAGO, Esq.
Attorney for Defendant Frank Doran

RESSA & NAPPI, Esqs.
Attorneys for Defendant Howard Einhorn
RALPH A. NAPPI, Esq.
Of Counsel

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BARTELS, D.J.

Plaintiffs are domestic corporations operating bars at various addresses in the Town of North Hempstead, and provide for their customers entertainment in the form of topless dancing. On July 17, 1973, the Town of North Hempstead passed Local Law No. 1—1973,[1] making it unlawful (i) for any person conducting or operating any bar, lounge or other public place to permit a waitress, bar maid or entertainer to appear with uncovered breasts, or (ii) for any person to appear in any bar, lounge or public place with uncovered breasts or to appear in any entertainment or sketch with uncovered breasts. The maximum penalty for a violation is a fine of $500 or imprisonment for fifteen days, or both, each day's violation constituting a separate violation.

Plaintiffs seek injunctive and declaratory relief, pursuant to 28 U.S.C. §§ 2201 *et seq.* against the enforcement by the defendants of the Local Law, charging a violation of their civil rights under 42 U.S.C. § 1983. On August 9, 1973, they moved for a preliminary injunction and at the same time for a temporary restraining order. The temporary restraining order was denied by Judge Dooling and the return date for the motion for preliminary injunction was fixed by consent for August 22, 1973. On August 10, 1973, after the denial of the temporary restraining order but before the hearing on the preliminary injunction, one of the plaintiffs, M & L Rest, Inc., resumed its entertainment consisting of topless dancing, and consequently on that day and each of the three successive days the owner and the dancers were served with criminal summonses for violating the ordinance, and a hearing was set therefore in the Nassau County Court for September 13, 1973. It is uncontested that plaintiffs in the operation of their bars have for a number of years permitted female dancers to

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appear on the stage with uncovered breasts in order to provide entertainment for their respective customers. Since the passage of the law all plaintiffs but M & L Rest, Inc. have discontinued the topless dancing entertainment in their bars. Plaintiffs allege that the ordinance is unconstitutional because it inhibits the full exercise of their First Amendment freedoms and is overbroad, claiming that they should not be required to defend criminal prosecutions to vindicate their constitutional rights, citing, among other authorities, *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), and *Zwickler* v. *Koota,* 389 U.S. 241 (1967). They claim irreparable harm resulting from substantial loss of business and threatened bankruptcy. While this claim has not been established, it has not been denied.

I

For the reasons hereinafter stated, the Court finds that the ordinance is facially unconstitutional. Although *Dombrowski*[2] and *Zwickler* sanction federal intervention, the Court is faced with the restrictions placed upon such anticipatory challenges to a state ordinance by *Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971); *Boyle* v. *Landry,* 401 U.S. 77 (1971); *Perez* v. *Ledesma,* 401 U.S. 82 (1971); *Dyson* v. *Stein,* 401 U.S. 200 (1971), and *Byrne* v. *Karalexis,* 401 U.S. 216 (1971). Those cases held that the federal courts were precluded, except in "exceptional and extremely limited circumstances," from intervention by way of either injunctive or declaratory relief in any existing state criminal prosecutions. Such extraordinary circumstances may be found (1) where there is harassment and bad faith by the local officials in enforcing a state statute or ordinance, or (2) where irreparable injury might result from the enforcement of a statute that is "patently and flagrantly unconstitutional on its face." See *Younger,* and companion

cases, *supra*. Thus, the principles of *Dombrowski* and *Zwickler* must be administered with great caution and with the realization that their sweep has been somewhat curtailed. In short, where the state has already initiated criminal proceedings, the Court must not reach out and enjoin the same absent extraordinary circumstances. Explicitly left open by the Supreme Court was the question "about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." *Younger* v. *Harris, supra,* 401 U.S. at 41. In *Lake Carriers' Association* v. *MacMullan,* 406 U.S. 498, 509 (1972), Mr. Justice Brennan seemed to answer the question stating that "in the absence of a pending state proceeding . . . exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." Other cases following *Younger* have permitted federal intervention even though a state proceeding was initiated one day after the federal proceeding. *Boraas* v. *Village of Belle Terre,* 476 F.2d 806 (2d Cir. 1973); *Kennan* v. *Nichol,* 326 F.Supp. 613 (W.D.Wis.1971).

In this case there was no state proceeding pending on August 9th at the time the complaint was filed and the application for a temporary restraining order heard. It was not until August 10th after the denial of the restraining order that a summons was served and state prosecution initiated with respect to one of the plaintiffs who refused to observe the ordinance. But this was after this Court assumed jurisdiction. The remaining two plaintiffs continue their compliance with the Local Law and are not subjected to any state proceeding. A hearing in the county court on the presently pending criminal proceeding against M & L Rest, Inc. is scheduled for September 13, 1973, and there is no indication as to when a final determination will be made by the county court. Even when

made such a determination may not necessarily dispose of the claims of the other two plaintiffs. Assuming that this state proceeding against M & L Rest, Inc. was pending at the time the federal proceeding was begun, this circumstance would not be a sufficient reason for abstention with respect to the other two plaintiffs who have complied with the ordinance but are threatened with prosecution upon violation. We do not believe these plaintiffs should be forced to violate the Local Law affecting their First Amendment rights, and subject themselves to a criminal prosecution in order to place themselves before the same judicial formum scheduled to decide the case of the other plaintiff, M & L Rest, Inc. See *Wulp* v. *Corcoran,* 454 F.2d 826 (1st Cir. 1972). Moreover, a prior state court decision, *Brandon Shores, Inc. and Patricia A. Soll* v. *Incorporated Village of Greenwood Lake,* 68 Misc.2d 343, 325 N.Y.S.2d 975 (Sup.Ct. Orange Co. 1971), upheld a similar ordinance without facing the constitutional issue involved. See *Dombrowski* v. *Pfister, supra; Zwickler* v. *Koota, supra.*

We conclude, therefore, that under the circumstances the pendency of a state court proceeding against one of the federal plaintiffs should not bar the others from anticipatory federal relief. See *Thoms* v. *Heffernan,* 473 F.2d 478 (2d Cir. 1972). If federal relief is granted to these two plaintiffs, it would be anomalous not to extend it to all plaintiffs. Likewise, arrest and the direct and immediate fear of arrest and prosecution under the Local Law is requisite "injury" to afford the necessary standing for plaintiffs to institute the action. See *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

Defendants' reliance upon the federal anti-injunction statute, 28 U.S.C. § 2283, which with certain exceptions expressly restrains a federal court from enjoining a state

court proceeding, is misplaced. This statute is not applicable to a civil rights action which falls within the statutory exception and where injunctive relief is not otherwise barred by the principles of *Younger*. *Mitchum* v. *Foster*, 407 U.S. 225 (1972); *Sheridan* v. *Garrison*, 415 F.2d 699 (5th Cir. 1969).

II

Defendants argue that the justification for the ordinance is the exercise of police power by the local community to bar conduct it deems offensive to its own general welfare, public safety, order and morals. Defendants maintain that the principles enunciated in *Paris Adult Theatre I, et al.* v. *Slaton*, 93 S.Ct. 2628 (1973), and *Miller* v. *California*, 93 S.Ct. 2607 (1973), justify the constitutionality of this particular ordinance under some community standard test. They argue that in both of those cases the Court upheld anti-obscenity legislation by adopting a "contemporary community standard" test and holding that community welfare could be debased "by crass commercial exploitation of sex." This argument is difficult to follow because in a non-obscenity context there is no "contemporary community standard" test that would justify a restriction upon plaintiffs' First Amendment freedoms. *Miller* v. *California*, *supra*.

Other authorities cited by the defendants in support of the ordinance are *Brandon Shores*, *supra*, and *California* v. *LaRue*, 409 U.S. 109 (1972). *Brandon* upheld an ordinance in many respects similar but not as broad as the ordinance herein involved. The Court there found that the Village of Greenwood Lake acted properly and within the limits of its police power. No reason was given why plaintiffs' First Amednment rights were not violated or on what basis the police power of the state could so easily brush aside plaintiffs' constitutional guarantee of freedom

of speech. With all due deference to the state court, this Court finds that it cannot adopt its rationale.

In *California* v. *LaRue*, *supra*, it was held that the California State Liquor Authority had a right to regulate topless dancing in bars and cabarets within the purview of its authority to control the sale of alcoholic beverages under the Twenty-first Amendment. This decision is cited for the principle that the privileges and immunities of the First Amendment are not absolute or without limitation. Obviously *LaRue*, which is predicated upon the powers of the State Liquor Authority, has no relevance to the constitutionality of the present ordinance, which has no other justification than the exercise of the police powers of the community. While it is true that the police power of the state may be invoked for the protection of society, it cannot be exercised in a manner inconsistent with the peaceful expression of the plaintiffs' constitutionally protected First Amendment rights. *Edwards* v. *South Carolina*, 372 U.S. 229 (1962); see also *Miller* v. *California*, *supra*, at 2616, n. 8.

We recognize, as stated in *Younger* v. *Harris*, *supra*, 401 U.S. at 51, that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means." However, we cannot escape the conclusion that there is more than simply a "chilling" effect upon First Amendment rights in the enforcement of this ordinance.

III

Turning to the merits of the application, it appears clear that dancing is a form of expression protected by the First

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Amendment. In fact, this is not denied by the defendants, who admit that no question of obscenity is here involved and that even dancing in the nude may fall within the purview of First Amendment protection. See *California* v. *LaRue, supra; PBIC, Inc.* v. *Byrne,* 313 F.Supp. 757 (D. Mass. 1970), *judgment vacated and remanded to consider mootness,* 401 U.S. 987 (1971); *Southreastern Promotions, Ltd.* v. *Atlanta,* 334 F.Supp. 634 (N.D.Ga. 1971); *Southeastern Proomtions, Ltd.* v. *Mobile,* 457 F.2d 340 (5th Cir. 1972); *Yauch* v. *State,* 19 Ariz.App. 175, 505 P.2d 1066 (1973); *In re Giannini,* 69 Cal.2d 563, 446 P.2d 535, 72 Cal.Rptr. 655 (1968).

It also appears that the ordinance is so broad that it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940). Moreover, there is no room in the ordinance for "a state construction which might obviate the need for a decision on the constitutional issue." *Zwickler* v. *Koota, supra,* at 256-57 (Harlan, J. concurring). The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance. The ordinance would also prohibit the production of the musical performance "Hair," which included a female topless performer but was protected against prosecution under a Massachusetts obscenity statute. See *PBIC, Inc.* v. *Byrne, supra.* We, therefore, believe that on its face as drawn the ordinance is constitutionally invalid as an infringement upon plaintiffs' First Amendment freedoms.

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In conclusion, we find that (1) Local Law No. 1-1973 of the Town of North Hempstead is on its face violative of plaintiffs' First Amendment rights in that it prohibits across the board non-obscene conduct in the form of topless dancing, and (2) that the daily penalty of $500 for each violation of the ordinance, the prior state court decision validating a similar ordinance, the overbreadth of the ordinance, and the potential harm to plaintiffs' business by its enforcement justify federal intervention and injunctive relief.

Therefore, it is hereby ordered that pending the final determination of this action the defendants and each and everyone of them are hereby enjoined from prosecuting the plaintiffs for any violation of Local Law No. 1-1973 of the Town of North Hempstead or in any way interfering with their activities which may be prohibited by the text of said Local Law.

Dated: Brooklyn, N. Y., September 6, 1973.

JOHN R. BARTELS
United States District Judge

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FOOTNOTES

[1] Local Law No. 1-1973 provides, in part:

"SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret, bar and/or lounge, dance hall, or discotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female."

"Public Place" is defined in Section 2.0 as "Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes; or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term 'public place', where used in this law, shall include the term 'public assembly' or 'assembly' as may be used in other codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead."

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[2] In *Dombrowski* indictments had been returned in the state court prior to the decision of the Supreme Court which issued a mandate including directions for "framing of a decree restraining prosecution of the pending indictments against the individual appellants . . ." 380 U.S. at 497.

Appendix C.

Judgment Appealed From.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

73-2436

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of June one thousand nine hundred and seventy-four.

Present: HON. J. EDWARD LUMBARD
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges.

Salem Inn, Inc., M & L Rest, Inc.,
and Tim-Rob Bar, Inc.,

Plaintiffs-Appellees,

v.

Louis J. Frank, individually and as Police Commissioner of Nassau County, Frank Doran, individually and as Town Attorney of the Town of North Hempstead, and Howard Einhorn, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix C.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

Appendix D. Filed August 15, 1974

Notice of Appeal to the Supreme Court of the United States.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action No. 732436

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs-Appellees,

—against—

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that FRANK DORAN, defendant above named, hereby appeals to the Supreme Court of the United States as of right from the decision of the United States Court of Appeals, Second Circuit, and each

and every part thereof, entered in this action on June 25, 1974.

This appeal is taken pursuant to 28 USC § 1254(2).

Dated: Manhasset, New York, August 1, 1974.

JOSEPH H. DARAGO,
Attorney for Appellant, Francis F. Doran, Individually and as Town Attorney of the Town of North Hempstead
220 Plandome Road
Manhasset, New York 11030
516-627-0590

To:

CLERK OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
225 Cadman Plaza
Brooklyn, New York 11201

KASSNER & DETSKY, Esqs.
Attorneys for Plaintiffs-Appellees
122 East 42nd Street
New York, N. Y. 10017

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-337

FRANK DORAN, Individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jurisdictional Statement filed September 24, 1974.

Probable Jurisdiction noted January 20, 1975.

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Omissions From Appendix.

The following items are omitted from this Appendix because they are printed in the jurisdictional statement at the pages noted.

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Docket Entries.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Case No. 73-C-1200

Date	*Filings-Proceedings*
8/ 9/73	Complaint filed. Summons issued.
8/14/73	Order to Show Cause dated 8/9/72, returnable 8/17/73 for Order enjoining enforcement of Local Law No. 1 of 1973 filed.
8/20/73	Affidavit of Joseph H. Darago in opposition to motion for preliminary injunction of Local Law No. 1 of 1973, and Memorandum of Law on behalf of Frank Doran filed.
8/20/73	Memorandum of law on behalf of Louis J. Frank, filed.
8/21/73	Affirmation of Ralph J. Nappi, in opposition to motion for preliminary injunction filed.
8/22/73	Affidavits of service of Memorandum of Law, of Frank Doran and Louis Schultz filed.
8/22/73	Summons returned and filed with affidavits of service executed.
8/22/73	Affidavit of Joseph Foley filed.
8/27/73	Stenographer's transcript dated 8/22/73 filed.
8/30/73	Motion for leave to participate as amicus curiae by Town of Huntington, New York filed.

Docket Entries.

Date	*Filings-Proceedings*
8/30/73	Answer of Louis J. Frank filed.
9/ 5/73	Answer of Frank Doran filed.
9/ 7/73	Order by Bartels, J. dated 9/6/73 that pending final determination of action, defendants are enjoined from prosecuting plaintiffs. P/C mailed to attorneys.
9/12/73	Notice of Appeal filed. Duplicate of appeal and duplicate of the docket entries mailed to C/A.
9/19/73	Answer of Howard Einhorn filed.
9/25/73	Record on Appeal certified and mailed to C/A.
10/ 4/73	Acknowledgment received from C/A for receipt of Index to Record on Appeal.
8/ 5/74	Certified copy of judgment and opinion received from C/A affirming Order of District Court filed.

Docket Entries.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 73-2436

Date	*Filings-Proceedings*
9/17/73	Copies of docket entries and notice of appeal filed.
9/27/73	District Court record filed.
1/15/73	Motion extending time to file brief and appendix by Frank Doran to 11/19/73 filed.
11/21/73	Order granting motion for leave to file brief and appendix by Frank Doran filed.
11/21/73	Brief and appendix by Frank Doran filed with proof of service.
1/ 2/74	Motion for extension of time to file Salem Inn's brief filed.
1/ 3/74	Order granting motion to file Salem Inn's brief filed.
1/ 3/74	Salem Inn's brief filed with proof of service.
2/ 5/74	Motion for leave to file brief amicus curiae by Town of Huntington with proof of service.
2/13/74	Order granting motion for leave to file brief amicus curiae by Town of Huntington filed.

3/ 5/74	Argument heard (by: Lumbard, Oakes, Timbers).
3/14/74	Amicus curiae brief by Town of Huntington with proof of service filed.
6/25/74	Judgment affirmed, Oakes, C.J.; dissent in separate opinion, Lumbard, C. J.; judgment filed.
7/ 9/74	Salem Inn's itemized and verified bill of costs with proof of service filed.
8/ 1/74	Statement of costs filed.
8/ 1/74	Issued mandate (opinion, judgment, and statement of costs).
8/15/74	Copy of notice of appeal to Supreme Court filed.
10/10/74	Notice of filing of appeal (74-337) filed.
1/27/75	Certified copy of order of Supreme Court noting probable jurisdiction filed.

Complaint.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 C 1200

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,
Plaintiffs,

against

LOUIS J. FRANK, Individually and as Police Commissioner of Nassau County, FRANK DORAN, Individually and as town attorney of the town of North Hempstead and HOWARD EINHORN, Individually and as Chief of Police of the Village of Port Washington,

Defendants.

1. This is an action for injunctive relief and declaratory relief pursuant to Title 28, United States Code, Section 2201 and arises under Title 42, United States Code, Section 1983. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1343.

(a) The matter in controversy arises under the Constitution and the laws of the United States of America;

(b) This is an action to redress the deprivation, under color of law, of the rights, privileges and immunities secured to plaintiffs by the Constitution of the United States of America;

(c) This is an action to secure equitable relief for the protection of plaintiffs' civil rights;

(d) This is an action to have declared unconstitutional and to enjoin the enforcement, operation and execution of Local Law No. 1-1973 of the Town of North Hempstead.

Complaint.

PARTIES

2. Plaintiff, Salem Inn, Inc., is a domestic corporation and is the operator of the Salem Inn located at 352 Port Washington Boulevard in the village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

3. Plaintiff, M & L Rest, Inc., is a domestic corporation and the operator of the Miramar Bar located at 672 Port Washington Boulevard in the village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

4. Plaintiff, Tim-Rob Bar, Inc., is a domestic corporation and the operator of the Interlude Lounge located at 1656 Hillside Avenue, New Hyde Park, Town of North Hempstead, County of Nassau, State of New York.

5. Defendant, Louis J. Frank, is the Police Commissioner of the County of Nassau and as such is responsible for the enforcement of the laws of the Town of North Hempstead within the Town of North Hempstead.

6. Defendant, Frank Doran, is the town attorney for the Town of North Hempstead and as such is in charge of administering and enforcing the laws of the Town of North Hempstead.

7. Defendant, Howard Einhorn, is the Chief of Police of the Village of Port Washington, and as such is responsible for the enforcement of the laws of the town of North Hempstead in the village of Port Washington.

LOCAL LAW IN ISSUE

8. Local Law No. 1-1973, of the Town of North Hempstead (hereinafter referred to as the Law), the full text of which is annexed hereto and made a part hereof as Exhibit A, makes it unlawful for any person who conducts, maintains, or operates any premises open to the public, including but not limited to any bar or lounge to permit any person to appear in such premises with uncovered breasts. The law also makes it unlawful for a person to appear in such premises with uncovered breasts. Any person who violates this Law is punishable by a fine not exceeding $500.00 or imprisonment for a period not to exceed 15 days or both. The Law became effective July 17th 1973.

GROUNDS FOR RELIEF

9. Plaintiffs are lessees and operators of premises open to the public within the jurisdiction of this court, in which female dancers with uncovered breasts have been providing entertainment for adult patrons. This entertainment by female dancers is expression presumptively protected under the First Amendment of the United States Constitution.

10. Plaintiffs have invested substantial sums of money in the said bars which have a large and loyal following among the adult members of the community who desire to be entertained by the topless dancers.

11. Plaintiffs have provided topless dancing entertainment for a number of years until the Law became effective on July 17th 1973. Since that time plaintiffs and their dancers under fear and threat of arrest and prosecution have ceased to provide topless dancing entertainment, thereby succumbing to the chill placed upon the exercise of their First Amendment rights.

12. This cessation of topless dancing entertainment has resulted in a marked diminution of plaintiffs' business since the clientele of plaintiffs' businesses are accustomed to topless dancing entertainment and patronize the plaintiffs' establishments with the expectation of being entertained thereby.

13. The dancers which perform in plaintiffs' bar are employed only as topless dancers. They are not waitresses and perform no other function on the premises. They dance on stages and are well received by patrons.

14. Only adults are permitted to enter the bars. The patrons never go near the dancers. The dancing is performed in a decorous manner and never offends any of the patrons.

15. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

16. Compliance with the Law has resulted in substantial curtailment of the businesses of plaintiffs and ultimately can result in forcing the plaintiffs to go out of business.

17. Compliance with the Law has forced the dancers to be instructed to fully cover their breasts while dancing therefore chilling the exercise by plaintiffs and their dancers of their First Amendment rights.

18. The Law deprives the patrons of the plaintiffs' bars of the right to view constitutionally protected expression.

19. The Law on its face and as applied to the exercise of First Amendment rights is so discretionary, vague and

overbroad and devoid of objective guidelines as to restrain and chill the exercise of such rights in violation of the First and Fourteenth Amendments, in that it forbids the exhibition of non-obscene expression presumptively protected by the First Amendment.

20. The Law as applied bears no rational relationship to a valid governmental purpose and as such is violative of the Fourteenth Amendment.

21. The Law as applied has as its sole purpose suppression and as such is violative of the Fourteenth Amendment.

22. The Law is causing plaintiffs great and immediate irreparable harm and plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand:

(1) A declaratory judgment that Local Law No. 1-1973 of the town of North Hempstead is unconstitutionally violative of the First and Fourteenth Amendments to the United States Constitution on its face and as applied.

(2) A permanent injunction prohibiting the defendants, their agents, servants and employees, from in any enforcing Local Law No. 1-1973 of the town of North Hempstead with respect to plaintiffs' premises where entertainment is provided by dancers with uncovered breasts.

(3) The costs of this action.

(4) Such other, further and different relief as may be just and proper.

KASSNER & DETSKY
Attorneys for Plaintiffs

Exhibit A, a Portion of the Resolution of Town Board of Town of North Hempstead Enacting Local Law No. 1 of 1973, Annexed to Foregoing Complaint.

PLEASE TAKE FURTHER NOTICE that the proposed Local Law shall read as follows:

TOWN OF NORTH HEMPSTEAD

Local Law No. 1—1973

A Local Law Prescribing the Regulation of Cabarets, Bars, Lounges, Dance Halls, Discotheques and Other Public Places in General.

SECTION 1.0—LEGISLATIVE PURPOSE

It is hereby declared the policy of the Town Board of the Town of North Hempstead, County of Nassau, State of New York, that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincorporated areas of the Town of North Hempstead, it is necessary to regulate and control the operations of public places used as cabarets, bars or lounges, dance halls, discotheques and other public places in general so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and of persons employed, whether for hire or not, in such establishments.

SECTION 2.0—DEFINITIONS

1. Public Place—Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes; or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar

classifications of this section. For the purposes of interpretation, the term "public place", where used in this law, shall include the term "public assembly" or "assembly" as may be used in other codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead.

2. Cabaret—Any public place directly or indirectly selling or serving food, drink, or alcoholic beverages to the public and in which any musical entertainment, singing, dancing in a designated area, or other form of amusement is also permitted, and shall include such a room, place, or space which provides incidental musical entertainment by mechanical devices with or without dancing.

3. Bars, Lounges or Discotheques—Any public place in which the business of directly or indirectly selling and/or serving food, drink, or other beverages to the public is conducted and in which any musical entertainment, singing, dancing in a designated area or other form of amusement is also permitted, and shall include such a room, place or space which provides incidental musical entertainment by live musicians or mechanical devices with or without dancing.

4. Dance Halls—Any public place in which dancing is carried on and to which the public may gain admittance either with or without the payment of a fee.

5. Person—An individual, partnership, club, association, corporation, society, or any other organized group of persons and shall include officers, directors, stockholders, partners and trustees of a club, corporation, partnership, association, or society.

6. Town of North Hempstead—The unincorporated area of the Town of North Hempstead, County of Nassau, State of New York.

SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other person who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret, bar and/or lounge, dance hall, or discotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to femals only.

Exhibit A, Resolution of Town Board of Town of North Hempstead Enacting Local Law No. 1 of 1973, Annexed to Foregoing Complaint.

Reference to the lower part of the torso refers to both male and female.

SECTION 4.0—PENALTY

Any person who shall violate any section of this local law shall be guilty of a violation punishable by a fine not exceeding Five Hundred ($500.00) Dollars, or imprisonment for a period not to exceed fifteen (15) days or both, Each day's continued violation shall constitute a separate violation.

SECTION 5.0—EFFECTIVE DATE

This local law shall take effect immediately upon the filing with the Secretary of State.

Dated: Manhasset, New York, June , 1973.

BY ORDER OF THE SUPERVISOR AND THE TOWN BOARD OF THE TOWN OF NORTH HEMPSTEAD
WILLIAM H. RYAN, JR.,
Town Clerk.

MICHAEL J. TULLEY, JR.
Supervisor.

Affidavit of Frederick Glenn, in Support of Order to Show Cause With Temporary Restraining Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FREDERICK GLENN, being duly sworn, deposes and says:

I am the manager of Salem Inn, Inc., one of the Plaintiffs herein, which is the operator of the Salem Inn at 352 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

During the eight years that I have operated the said bar, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has until July 17, 1973, offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I have been advised that Local Law number 1-1973 of the Town of North Hempstead has gone into effect on July 17, 1973 by which topless dancing has been outlawed in the Town of North Hempstead. As a result, I have required my dancers to wear bikini tops. This has already resulted in a marked diminution of business since our clientele are accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby.

Our dancers are employed in that capacity only. They are not waitresses and perform no other function in the

Affidavit of Frederick Glenn, in Support of Order to Show Cause With Temporary Restraining Order.

premises. They dance on a stage and are well received by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear of prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formerly disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Frederick J. Glenn, July 18, 1973.)

Affidavit of Nicholas Benevento, in Support of Order to Show Cause With Temporary Restraining Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NICHOLAS BENEVENTO, being duly sworn, deposes and says:

I am the President of M & L Rest, Inc., one of the Plaintiffs herein, which is the operator of the Miramar Bar at 672 Port Washington Boulevard in the Village of Port Washington, Town of North Hempstead, County of Nassau, State of New York.

During the two and a half years that I have operated the said bar, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has until July 17, 1973, offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I have been advised that Local Law number 1-1973 of the Town of North Hempstead has gone into effect on July 17, 1973 by which topless dancing has been outlawed in the Town of North Hempstead.

Prior to that date, I consulted with Captain Tedford of the Port Washington Police Department and was advised that pasties would not be acceptable compliance with the said ordinance. As a result, I have required my dancers to wear bikini tops. This has already resulted in a marked diminution of business since our clientele are accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby.

Affidavit of Nicholas Benevento, in Support of Order to Show Cause With Temporary Restraining Order.

Our dancers are employed in that capacity only. They are not waitresses and perform no other function in the premises. They dance on a stage and are well received by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear and prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formerly disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Nicholas Benevento, July 18, 1973.)

Affidavit of Joseph Donald Foley, in Support of Order to Show Cause for Temporary Restraining Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH DONALD FOLEY, being duly sworn, deposes and says:

I am the President of Tim-Rob Bar, Inc., one of the Plaintiffs herein, which is the operator of the Interlude Lounge at 1656 Hillside Avenue, New Hyde Park, New York, Town of North Hempstead, County of Nassau, State of New York.

During the three years that I have operated the said bar with topless dancers, there has never been any criminal charge brought against the Plaintiff notwithstanding the fact that Plaintiff has until July 17th, 1973, offered to its patrons entertainment in the form of dancers who have been topless and have worn panty hose and G-strings.

I have been advised that local law number 1—1973 of the Town of North Hempstead has gone into effect on July 17, 1973 by which topless dancing has been outlawed in the Town of North Hempstead. As a result, I have required my dancers to wear bikini tops. This has already resulted in a 50% diminution of business since our clientele are accustomed to topless dancing entertainment and patronize our establishment with the expectation of being entertained thereby .

Our dancers are employed in that capacity only. They are not waitresses and perform no other function in the

Affidavit of Joseph Donald Foley, in Support of Order to Show Cause for Temporary Restraining Order.

premises. They dance on a stage and are well reecived by our clientele.

The substantial curtailment of our business resulting from our compliance with the ordinance can result in our having to go out of business.

Only adults are permitted to enter the premises. Patrons never go near the dancers. The dancing is performed in a decorous manner and never offends our patrons. Conspicuous signs clearly advise prospective patrons of the nature of the entertainment offered in the premises and thereby deter adults who would be offended by such entertainment from entering the premises.

I have been advised by my attorney that the ordinance violated the First and Fourteenth Amendments in that it is vague and overbroad and establishes a censorship of expression presumptively protected by the said First Amendment.

As a result of fear of prosecution under the ordinance, all dancers have been instructed to fully cover their breasts while dancing. The ordinance has, therefore, chilled the exercise by Plaintiff and its dancers of their First Amendment rights. Each day that the ordinance remains in effect, results in substantial monetary losses to the Plaintiff and results in a deprivation to our clientele of the right to view the constitutionally protected expression formery disseminated in the premises. We are suffering irreparable injury by reason of the chill placed upon the exercise of our First Amendment rights by the ordinance. We respectfully request that this chill be removed by the granting of the relief sought herein.

No prior application has been made for the relief sought herein.

(Sworn to by Joseph Donald Foley, July 26, 1973.)

Affidavit of Nicholas Benevento, in Support of Motion for Preliminary Injunction.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NICHOLAS BENEVENTO, being duly sworn, deposes and says:

I am the president of M & L Restaurant, Inc., the operator of the Miramar Bar in Port Washington, New York, I am familiar with the facts of the instant proceeding, and make this affidavit in support of the pending motion for a preliminary injunction herein.

On August 10, 1973 your deponent, by reason of the seventy-five percent drop in business incurred as a result of plaintiff's compliance with the Ordinance against topless entertainment, facing the spectre of total insolvency, reinstituted the pre-existing policy of offering topless entertainment to the patrons of the Miramar Bar. As a result, police officers of the Port Washington police force entered the premises on August 10, August 11, August 12 and August 13, and on each of those occasions served the undersigned and a dancer with a criminal summons for violating the Ordinance. Thus, eight criminal prosecutions have been commenced against the undersigned and his employees in a four day period. Each of those proceedings could result in a fifteen day jail sentence and a five hundred dollar fine.

Affidavit of Nicholas Benevento, in Support of Motion for Preliminary Injunction.

From the foregoing it is quite apparent that the defendants not only intend to enforce this Ordinance but are doing so rigorously.

I have been advised by my attorney that the Ordinance is constitutionally invalid and in violation of the First and Fourteenth Amendment rights of myself, the dancers, and our patrons. He further advises me that I am not obligated to follow the mandates of an unconstitutional speech inhibiting law.

I cannot over emphasize that I am confronted with either going out of business for lack of patronage or offering my patrons the entertainment which has made the premises an aesthetic commercial success.

(Sworn to by Nicholas Benevento, August 16, 1973.)

Affidavit of Joseph Foley, in Support of Motion for Preliminary Injunction.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOSEPH FOLEY, being duly sworn, deposes and says:

I am the President of Tim-Rob Bar, Inc., the operator of the Interlude Lounge, and a Plaintiff herein.

After offering topless entertainment for a period of three years at the above mentioned premises, I immediately discontinued such entertainment on July 17, 1973 when the town of North Hempstaed passed a law outlawing such entertainment in all public places.

In the period of over a month since that date my business has fallen over two-thirds and I am faced with insolvency. One of the Plaintiffs in this case, advised by our attorney that the statute is clearly unconstitutional in violation of First and Fourteenth Amendment rights, resumed offering topless entertainment after this action was commenced. He has recaptured his business as well as some of mine, but has suffered the commencement of four criminal prosecutions against him and four criminal prosecutions against his dancers.

By reason of the sanctions of the law and my fear of losing my liquor license, I have chosen to await a legal determination and sustain the losses in the interim. This is becoming extremely difficult and onerous. We are losing money every day.

Affidavit of Joseph Donald Foley, in Support of Order to Show Cause for Temporary Restraining Order.

Despite the fact that I am not disobeying the law, since the enactment of the ordinance, police officials have visited my premises daily to make sure that I am complying with the prohibitions of the law. It appears as if a substantial portion of my clientele are policemen who drink coca-cola. The very presence of the policemen in the premises inhibits patronage by my few remaining customers.

By reason of the foregoing, I have suffered greater damage as a result of the enactment of the ordinance than I would have suffered had a portion of the premises been consumed by flames.

In the course of argument before the Court on August 22, 1973, there seems to be some implication that the reason for the adoption of the ordinance was to maintain public peace and safety. This is wholly and completely untrue. In the three years of topless entertainment in the premises prior to the enactment of the ordinance, there was not one case of disorder or other criminal activity. The same is true of the other Plaintiffs whose premises are well known for decorous behavior.

I respectfully beseech this Court for prompt adjudication and vindication of the Plaintiffs' civil liberties which are not only being chilled but stifled by the ordinance in question. I have been advised by my attorney that the vindication of just such rights is the primary function of this Federal Court.

(Sworn to by Joseph Foley, August 22, 1973.)

Affidavit of Joseph H. Darago, in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

JOSEPH H. DARAGO, being duly sworn, deposes and says:

1. He is a duly licensed attorney in the State of New York and a Deputy Town Attorney of the Town of North Hempstead. He is admitted to practice in the Eastern and Southern Districts for New York and appears in this action as counsel to Francis F. Doran, Town Attorney of the Town of North Hempstead.

2. The affidavit is made in opposition to the affidavits in support of a motion by the plaintiffs in this action for a preliminary injunction restraining the effect and enforcement of the Town of North Hempstead Local Law No. 1—1973, hereinafter referred to as the "Local Law".

3. On July 10, 1973, the Town of North Hempstead, hereinafter referred to as the "Town", enacted the Local Law which restricts entertainment in public places which is commonly known as "topless dancing". A copy of the Local Law is annexed to the moving papers in this action and it is admitted that the same is a true and exact copy of the Local Law as enacted on July 10, 1973, by the Town Board after a public hearing pursuant to the provisions of the Municipal Home Rule Law, Article 2, Section 10.

4. Thereafter the Local Law as enacted was filed with the Secretary of State on July 16, 1973, and became effective on that date. A copy of the receipt of the Secretary of the State of New York is annexed hereto as Exhibit "A".

5. The plaintiffs, domestic corporations in the State of New York, engaged in the business of operating bars in the Town of North Hempstead, brought on this proceeding challenging the validity of this Local Law, alleging that the same is in violation of their civil rights and by reason of the Local Law's enactment, have suffered a curtailment of business.

6. It is alleged that by reason of the existence of this Local Law, a chilling of the First Amendment rights of the plaintiffs and their patrons has resulted. The plaintiffs claim that the chilling effect on their First Amendment rights and the First Amendment rights of their customers results from the Local Law being "so discretionary, vague, overbroad, void of objecting guidelines . . ." as to result in the chilling effect.

7. Further, the moving affidavits of the plaintiffs claim that each of the plaintiffs, prior to the enactment of the Local Law, employed dancers for the purposes of entertainment, which dancers danced with their breasts uncovered. They allege that as a result of the Local Law restrictions, they now "require the dancers to wear bikini tops". The result of this direction, it is alleged, is the dimunition of business.

8. The moving affidavits in this action clearly are inadequate to support the preliminary relief of injunction against the enforcement of the Local Law sought by these plaintiffs.

9. The moving affidavits are conclusory without a scintilla of evidence to support the claims that there has been

a loss in business or that the First Amendment rights of the plaintiffs and/or their patrons have been affected by a chill. The mere conclusion that business is off without economic proof of loss is without value to this action.

10. Further, the claim of the plaintiffs is rendered meaningless insofar as subsequent to the enactment of the Local Law, at least one or more of the plaintiffs have undertaken to violate the restrictions of the Local Law and have on one or more occasions continued to present topless dancing.

11. On July 13, 1973, your deponent visited the Miramar Lounge, owned and operated by M & L Rest, Inc., one of the plaintiffs herein, and while at the bar, observed between the hours of 9:00 P.M. and 10:15 P.M., a dancer entertaining the seven or eight patrons in the bar by dancing with her breasts uncovered.

12. The allegations in the affidavit of Nicholas Benevento, President of plaintiff, M & L Rest, Inc., that "as a result of fear of prosecution under ordinance (Local Law) all dancers have been instructed to fully cover their breasts while dancing. The ordinance (Local Law) has therefore chilled the exercise by plaintiff and its dancers of their First Amenment Rights" is meaningless, untrue and without basis in fact sufficient to support the claim of infraction by the Local Law of plaintiff's First Amendment rights.

13. The local authorities have issued summonses for violations of the Local Law and the enforcing authorities will in due course prosecute the violations in accordance with the provisions of the New York State Criminal Procedure Law.

14. The Local Law provides for a fine and/or imprisonment for each day's continued violation of the Local Law.

The plaintiffs, by reason of the violations, will be able to raise the issue of constitutionality and validity of this Local Law in the context of these actions in the District Court of Nassau County.

15. The jurisdictional doctrines as established in *Younger* v. *Harris*, 401 U.S. 37, 91 S. Ct. 736, 27 L. Ed. 2nd 669 (U.S. Sup. Ct., 1971), requires this Court in this action to invoke the *Pullman* doctrine to avoid a needless and unwarranted friction between the Federal Courts and the Courts of the State of New York.

16. Similarly, the plaintiffs in this case have failed to show any exception to the mandate of Section 2283 of Title 23, U.S.C.

17. If in fact the Local Law interferes with the First Amendment of the United States Constitution, the question should not be decided in this Court. It is submitted that the plaintiffs have failed to show that the Local Law in question is void on its face or in any sense an overbroad regulation of expression. No evidence is presented in the allegations in the moving papers that the restricted conduct is not such conduct within the reach of an applicable limiting construction readily to be ascertained through the criminal prosecutions which have been commenced.

18. Nor have the plaintiffs shown that the conduct prohibited by the Local Law is overbroad with respect to the specific acts in which they propose to engage or suffer others to engage in for their own benefit.

19. No overbroadness on the face of the Local Law is readily apparent. The act of dancing without a covering for the breasts and the permitting to do so by the owners and operators of the bars in the Town of North Hempstead is such an action which would be prohibited by the

terms of this Local Law under any construction applied to it.

20. It is submitted that by reason of the regulations contained in the Local Law that are directed to specific, definite acts of the plaintiffs, it is not subject to the defects of "vague prohibitions". The specific acts prohibited are clearly and narrowly defined and sufficiently and adequately clear in the text of the Local Law. The acts would be prohibited under any construction given the Local Law, and no injunction should lie. The Local Law being clear, mandates this Court to abstain until the resolution of the issues in the District Court of Nassau County wherein the issues of the constitutionality can be decided.

21. The Town, in enacting the Local Law, acts under the color of State Law by reason of the authorization granted to it by the Penal Law of the State of New York.

22. The Town, therefore, has enacted the Local Law under the color of its powers granted by State Statutes. Thus, the Local Law is in furtherance of the general police power of the Town granted by the Town Law of the State of New York. The general "police power" of the municipality to set standards for its health, safety and welfare are apposite to this matter. Akin to the right to make laws for land use, the right to regulate business comes within these general "police powers" in light of the community standards, as determined by the local legislative body after a public hearing.

23. The Town has sufficient basis based upon the record of the public hearing to regulate the specific conduct as set forth in the Local Law. A copy of the transcript of the public hearing is annexed hereto and marked Exhibit "B".

Affidavit of Joseph H. Darago, in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

24. Any legal regulation infringes upon constitutional guaranties, but may be justified on the basis of the good and welfare of the community which is served by the restrictions.

25. The plaintiffs invoke their constitutional rights and the rights of their customers. Without assuming the standing to include the latter class of persons, the regulation does not infringe upon the right of those persons in any manner other than the way zoning laws and traffic laws would infringe upon the rights of expression.

26. It is submitted, therefore, that the plaintiffs have fallen short in this application for preliminary relief to prove or to even show evidence of a chilling effect of the Local Law due to its overbroadness or vagueness which warrants Federal Court interference with the State procedures.

WHEREFORE, it is respectfully requested:

(1) That this Court abstain from enjoining the enforcement of the Local Law #1.

(2) Stay this action pending the criminal prosecutions and resolution of all issues in the District Court, Nassau County, and any Appellate Court with the appropriate jurisdiction.

(3) In the alternative, declare immediate trial pursuant to Title 28, § 1980, et seq., U.S.C.

(4) Grant such other and further relief as to this Court is just and proper in this action.

(Sworn to by Joseph H. Darago, August 16, 1973.)

Summons.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action file No. 73-1200

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs,

against

LOUIS J. FRANK, Individually and as Police Commissioner of Nassau County, FRANK DORAN, Individually and as town attorney of the Town of North Hempstead and HOWARD EINHORN, Individually and as Chief of Police of the Village of Port Washington,

Defendants.

You are hereby summoned and required to serve upon Kassner & Detsky plaintiff's attorneys, whose address is 122 East 42nd Street, New York, N.Y. 10017 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ LEWIS ORGEL,
Clerk of Court.

/s/ MARC MILLER,
Deputy Clerk.

Date: August 9, 1973.

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Answer of Francis F. Doran.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

Defendant, Francis F. Doran, individually and as Town Attorney of the Town of North Hempstead, wrongfully sued herein as Frank Doran, individually and as Town Attorney of the Town of North Hempstead, by his attorney, Joseph H. Darago, as and for an Answer to the Complaint herein respectfully shows this Court and alleges:

DENIALS

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs numbered 2, 3, 4, and 5.

2. Admits the allegations that Francis F. Doran, wrongfully sued herein as Frank Doran, is the Town Attorney of the Town of North Hempstead, except that he denies that portion of Paragraph 5 which alleges responsibility for enforcement of the laws of the Town of North Hempstead within the Town of North Hempstead, which responsibility is a question of law, the nature and extent of which is to be determined by this Court.

3. Denies knowledge and information sufficient to form a belief as to each and every allegation contained in paragraphs numbered 7, 10, 12, 13, 14, 15, and 16.

4. Denies knowledge and information sufficient to form a belief as to the allegations in Paragraph 17 of the Complaint concerning any compliance by the plaintiffs with the law except that he denies any chilling effect by reason of the law on the exercise by the plaintiffs and their dancers of First Amendment rights.

5. Denies each and every allegation contained in paragraphs numbered 18, 19, 20, 21, and 22.

DEFENSES

6. Plaintiffs have failed to demonstrate sufficient standing for the relief herein requested, and, therefore, the Court lacks jurisdiction over the subject matter and the persons of the defendants herein.

7. The Court should refuse to exercise jurisdiction in this action on the grounds that State criminal proceedings have been instituted against one or more of the plaintiffs in this action.

8. Plaintiffs have failed to plead sufficient ultimate facts which show irreparable and immediate injury so as to be entitled to the relief sought herein.

WHEREFORE, defendants demand:

1. That the complaint herein be dismissed.

2. The costs and disbursements in this action.

3. Such other and further relief as to this Court may seem just, proper and equitable.

JOSEPH H. DARAGO
Attorney for Defendant
Francis F. Doran, individually and
as Town Attorney of the Town of
North Hempstead

Answer of Louis J. Frank.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

The defendant, LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, appearing herein by his attorney, JOSEPH JASPAN, County Attorney of Nassau County, as and for his answer to the complaint of the plaintiffs, alleges as follows:

I. Denies each and every allegation contained in Paragraph "1" of the complaint and its subdivisions, except that said defendant leaves for determination by the Court the legal conclusions alleged therein.

II. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs "2", "3", "4", "10", "12", "13", "14", "15" and "16" of the complaint.

III. Denies each and every allegation contained in Paragraph "5" of the complaint, except admits that LOUIS J. FRANK is the Police Commissioner of the County of Nassau and as such is responsible for the enforcement of the laws in those unincorporated areas in the Town of North Hempstead where there are no other police departments.

IV. Denies each and every allegation contained in Paragraphs "9", "11", "17", "18", "19", "20", "21" and "22" of the complaint.

Answer of Louis J. Frank.

AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE, SAID DEFENDANT ALLEGES AS FOLLOWS:

V. That in Paragraph "5" of the complaint, the defendant, LOUIS J. FRANK, is described as the Police Commissioner of the County of Nassau, and in which paragraph it is further alleged that he is responsible for the enforcement of the laws of the Town of North Hempstead.

VI. That as such Police Commissioner of the County of Nassau, the defendant, LOUIS J. FRANK, is not responsible for the enforcement of the laws of the Town of North Hempstead within the geographical limits of the Incorporated Village of Port Washington, nor is he responsible for the enforcement of the laws in other incorporated villages within the County of Nassau where there are separate village police departments.

VII. That there are no other allegations in the complaint with reference to any act or acts performed by the defendant, LOUIS J. FRANK, either in his individual capacity or as Police Commissioner of the County of Nassau, nor does the complaint charge said defendant either in his individual or representative capacity with a violation of any of the alleged rights of the plaintiffs.

VIII. That there is a failure in said complaint to state a claim upon which relief can be granted in favor of the plaintiffs against the defendant, LOUIS J. FRANK, either in his individual capacity or as Police Commissioner of Nassau County.

Answer of Louis J. Frank.

AS AND FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, SAID DEFENDANT ALLEGES AS FOLLOWS:

IX. That the defendant, LOUIS J. FRANK, as Police Commissioner of the County of Nassau, by virtue of his office as such Police Commissioner and the duties incumbent upon him as such Police Commissioner, is obliged to direct and require the enforcement of all local ordinances, local laws and statutes which require police enforcement, in those areas under the jurisdiction of the Nassau County Police Department, and that such enforcement of such local ordinances, local laws and statutes are enforced by the police officers of the County of Nassau in the ordinary course of their duties as such police officers, under the jurisdiction of the defendant as Police Commissioner of the County of Nassau.

WHEREFORE, the defendant, LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, demands judgment dismissing the complaint of the plaintiffs, together with the costs and disbursements of this action.

JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Defendant

LOUIS J. FRANK

By

Louis Schultz
Senior Deputy County Attorney

Answer of Howard Einhorn.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TITLE OMITTED IN PRINTING

Defendant, Howard Einhorn, individually and as Chief of Police of the Port Washington Police District, by his attorneys, Ressa & Nappi, as and for an answer to the complaint herein respectfully shows this Court and alleges:

DENIALS

1.) Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs numbered 2, 3, 4, and 5.

2.) Admits that the Defendant, Howard Einhorn, is Chief of Police of the Port Washington Police District and as such is responsible for the enforcement of the laws of the Town of North Hempstead in the areas encompassed by the Port Washington Police District.

3.) Denies knowledge and information sufficient to form a belief as to each and every allegation contained in paragraphs 6, 10, 12, 13, 14, 15, and 16.

4.) Denies knowledge and information sufficient to form a belief as to the allegations in Paragraph 17 of the Complaint concerning any compliance by the plaintiffs with the law except that he denies any chilling effect by reason of the law on the exercise by the plaintiffs and their dancers of First Amendment rights.

5.) Denies each and every allegation contained in paragraphs 18, 19, 20, 21, and 22.

WHEREFORE, defendant demands judgment dismissing the complaint together with the costs and disbursements of this action and for such other and further relief as to this Court may seem just and proper.

Yours, etc.

RESSA & NAPPI
Attorneys for Defendant
Howard Einhorn

To: JOSEPH H. DARAGO, Esq.
Attorney for Defendant
Francis F. Doran

KASSNER & DETSKY, Esqs.
Attorneys for Plaintiffs

JOSEPH JASPAN, Esq.
Nassau County Attorney

Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-337

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,
Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,
Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS OR AFFIRM

HERBERT S. KASSNER
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New York, New York 10017
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KASSNER & DETSKY, P.C.
of Counsel

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Article 235, New York State Penal Law 6

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-337

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the final judgment of the Court of Appeals be affirmed or, in the alternative, that this appeal be dismissed.

Statement of Case

Plaintiffs are the owners and operators of bars in Nassau County which provide live topless dancing entertainment by professional dancers who perform on a stage in a

decorous manner for the entertainment of forewarned consenting patrons.

On July 17, 1973, the Town of North Hempstead adopted Local Law No. 1-1973, which made unlawful the appearance of women with uncovered breasts in any public place and in addition, made unlawful the permitting of entertainment involving "topless women" in public places. Within the scope of activities prohibited by the Law was the type of dancing entertainment provided in plaintiffs' establishments. Because the Law made plaintiffs' dancing entertainment unlawful and because plaintiffs feared arrest and prosecution if they violated the Law, plaintiffs ceased on the date that the Law became effective to provide topless dancing entertainment for its patrons. This cessation caused plaintiffs to sustain severe economic loss and threatened them with insolvency and their employees with unemployment.

Faced with the likelihood of going out of business, plaintiffs filed a civil action to declare that Law unconstitutional as overbroad and in violation of the First Amendment and requested an injunction to halt its enforcement. At the same time, plaintiffs applied, in vain, for the issuance of a temporary restraining order.

Thereafter, plaintiff, M & L Rest., Inc., faced with immediate economic ruin, resumed providing topless dancing entertainment for its patrons. Immediately a series of eight multiple, repetitive harassing criminal prosecutions were commenced against Nicholas Benevento, president of M & L Rest., Inc. and his dancers notwithstanding the fact that defendants were aware of the pendency of the Federal action and the imminence of a determination of the constitutional issue raised therein. The remaining plaintiffs obeyed the Law attacked herein until the injunction was issued.

POINT I

The ordinance is clearly overbroad and presumptively invalid as a system of prior restraint on speech.

Appellants seek a determination by this Court that the ordinance attacked is entitled to a presumption of constitutionality as a valid exercise of police power. They fail to acknowledge the preferred position granted First Amendment rights by our Constitution. They thus say at page 10 of their jurisdictional statement, "Where the classification is broad so as to be 'debatable' the legislative judgment must stand."

It is respectfully submitted that such is not the law with respect to speech inhibiting legislation. As has often been held by this Court, any system of prior restraints of expression bears a heavy presumption against its constitutional validity. *N. Y. Times Co.* v. *U. S.*, 403 U.S. 713, 91 S. Ct. 2140; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 58, 91 S. Ct. 1574; *Carrol* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S. Ct. 631.

That the dance is a form of expression protected by the First Amendment of the United States Constitution is no longer a subject of dispute. *California* v. *LaRue*, 409 U.S. 109; *Hudson* v. *United States*, 234 A. 2d 903; *People* v. *Wendling*, 258 N.Y. 451; *People* v. *Conrad*, 334 N.Y.S. 2d 180; *P.B.I.C., Inc.* v. *Byrne*, 313 F. Supp. 757 (Three Judge Court), rev. on other grounds.

In what is undoubtedly the most thorough and exhaustive opinion on First Amendment protection of sexually oriented live performances, a three Judge Federal Court in Massachusetts, in the case of *P.B.I.C.* v. *Byrne, supra*, enjoined the prosecution by the State of Massachusetts of the show "Hair" under a lewdness statute or under the common law of indecent exposure. After concluding that "live

theatre productions like movies, are within the ambit of protection of the First Amendment" (page 762), and that "obscenity" in a First Amendment context is not protected from state regulation but that which falls short of it is (page 763), the Court concluded "that this same 'obscenity' standard also applies to the regulation of live theatre production" (page 763). The Court then goes on to explain its rationale for the foregoing conclusion by stating,

> "Confining state interference with the live theatre to that which is 'obscene' reflects the fundamental importance which the First Amendment attaches to the unencumbered expression of ideas." (page 764)

In *Roth* v. *United States*, 354 U.S. 476, the Supreme Court, for the first time, squarely decided that expression presumptively protected by the First Amendment could be denied that protection providing it met a three prong test of obscenity under a statute adopting such test. It did, nevertheless, make it clear that nudity did not constitute obscenity unless it met the proscription dictated in that three prong test. The Court stated,

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." (page 487)

In the recent reformulation of the three prong test of obscenity in the case of *Miller* v. *California*, 413 U.S. 15,

this Court did not depart from its basic holding that the First Amendment protects all literary, artistic, political or scientific expression except that which is obscene, saying at pages 23-24:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

The Court goes on to state at page 27,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

From the foregoing it is abundantly clear that expression presumptively protected by the First Amendment such as the dance performances which are prohibited across the board by the instant ordinance, cannot be proscribed except under an obscenity statute which is drawn in conformity with the constitutional mandates set forth in *Miller* v. *California*. It is also abundantly apparent that the ordinance involved in the instant proceeding does not, as written or as heretofore authoritatively construed, embody the three prong obscenity test set forth in *Miller*.

The ordinance thus "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech" and is, therefore, overbroad and constitutionally infirm. *Thornhill* v. *Alabama,* 310 U.S. 88, 97. This overbreadth places a chill on the exercise of First Amendment rights that cannot be tolerated.

It would be no answer to a claim of overbreadth to say that the law would be applied to one type of nude dancing and would not be applied to another. It is unconstitutionally overbroad if it *may* be applied to protected expression. *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 599. Thus in *NAACP* v. *Button,* 371 U.S. 415, 432-433, the Supreme Court held:

> "The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute *susceptible* of sweeping and improper application." (Italics supplied)

Lest it be thought that the invalidation of the Ordinance will deny local authorities any effective means of preventing obscene exhibitions, it should be noted that New York State has ample penal legislation in the form of the recently revised Article 235 of its Penal Law to insure that obscene performances will not go unpunished in the State of New York. The invalidation of the Ordinances herein as applied to presumptively protected expression will not impair the State's legitimate aims and means with respect to defending its citizens against obscene and thus unprotected speech.

The Ordinance attacked herein as applied, contains sweeping general prohibitions resulting in a dire chilling of First Amendment rights. As the Supreme Court observed in *Smith* v. *California,* 361 U.S. at 151:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *State of Alabama,* 310 U.S. 88, 97-98; Cf. *Staub* v. *City of Baxley,* 355 U.S. 313.
>
> "And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril herein, because the free dissemination of ideas may be the loser. *Winters* v. *People of State of New York,* 333 U.S. 507, 509-510, 517-518."

POINT II

Abstention is inappropriate herein.

It is well established and the Court below held, that where an action challenges local law as being violative of the First Amendment on its face a federal court must decide the issues on the merits and not abstain. *Zwickler* v. *Koota,* 389 U.S. 241, 248-252 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479, 483-485 (1964); *Long Island Viet Nam Moritorium Committee* v. *Cahn,* 437 F. 2d 344, 345-350 (CA2 1970). The rejection of abstention in such cases results from the paramount importance of removing the inevitable chilling effect on First Amendment rights that such a statute invariably establishes. As this court has held, relegating a plaintiff to a state court to vindicate First Amendment rights after a federal action had been commenced would not only be unwise but would constitute an

abrogation by federal courts of their prime esponsibility to uphold constitutional liberties. See: *Zwicler* v. *Koota, supra; Dombrowski* v. *Pfister, supra; Steffel* v. *Thompson,* 415 U.S. 452.

In *Zwickler, supra,* at 252, this Court statd:

> ". . . Congress imposed the duty uponall levels of the Federal judiciary to give due respectto a suitor's choice of a federal forum for the hearingand decision of his federal constitutional claims. Phinly, escape from that duty is not permissible merely ecause state courts also have the solemn responsibility,equally with the federal courts '. . . to guard, enforce and protect every right granted or secured by the Constitution of the United States . . .' Robb v. Connly, 111 U.S. 624. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply becaus the rights asserted may be adjudicated in some other forum."
>
> • • •
>
> "These principles have particular signifrance, when, as in this case, the attack upon the statute upon its face is for repugnancy to the First Amendment. In such a case to force the plaintiff who has commenced a federal action to suffer the delay of stae court proceedings might itself effect the impermisible chilling of the very constitutional right he seeks to protect."

This doctrine of non-abstention by a federal court in cases challenging statutes and ordinances on First Amendment grounds was modified in 1971 by the Supreme Court decision in *Younger* v. *Harris,* 401 U.S. 37 (1971). In that case this court stated that dictates of comity require that a federal court abstain from deciding a First Amendment

challenge to an ordinance or statute where at the time the federal action is commenced there is pending a state court criminal prosecution against the plaintiff in the federal action. The court, however, was careful to observe that its holding in no way changed the *Dombrowski* doctrine of non-abstention in cases where there was no state criminal proceeding pending against the federal plaintiff at the time the federal action was begun Thus, the court stated, 402 U.S. at p. 41:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."

The court went on to say:

> "A choice of a federal forum to vindicate first rights is entitled to significant weight in determining the availability of anticipatory rights."

The *Younger* v. *Harris* sextet of cases did not bar challenges to state statutes and ordinances. It merely narrowed the class of plaintiffs who could maintain such actions to those who were not involved in state criminal prosecutions under the attacked law at the time of the filing of the federal complaint. At least with respect to declaratory relief, the foregoing was made abundantly clear in *Steffel, supra.*

In the instant case, plaintiffs' action challenging the Law on First Amendment grounds was commenced before any state criminal prosecution was instituted. Even if the *Younger* doctrine would bar relief where a state criminal proceeding is subsequently commenced such a situation does not exist here. None of the Plaintiffs has ever been a defendant in a state criminal proceeding instituted under this Law. *Younger* is directed only towards those actually involved in such a proceeding.

Moreover, the commencement of eight prosecutions in the instant case removes it from the *Younger* v. *Harris* doctine. The court in *Younger* carefully pointed out that its holding was limited to a case involving a single prosecution where constitutional rights can be vindicated. The court noted at p. 49,

> "Here a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims. There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected. In other words, the injury that Harris faces is solely 'that incidental to every criminal proceeding brought lawfully and in good faith,' *Douglas,* supra, and therefore under the settled doctrine we have already described he is not entitled to equitable relief 'even if such statutes are unconstitiutional,' *Buck,* supra."

The instant case does not involve one prosecution but involves eight arrests and eight separate criminal proceedings all begun within a four day period. The arrests and prosecutions continued until halted by the District Court. Clearly it was the defendants' intention to continue arrests and prosecutions until persons and organizations exercising First Amendment rights in violation of the law succumbed even if it resulted in the destruction of their businesses prior to a judicial determination on the merits.

The District Court was correct in not abstaining, and the Circuit Court properly agreed.

CONCLUSION

The judgment below should be affirmed or the appeal dismissed by reason of the manifest unsubstantiality of the questions raised.

Dated: New York, New York, December 12, 1974.

Respectfully submitted,

HERBERT S. KASSNER
Attorney for Appellees

KASSNER & DETSKY, P.C.
of Counsel

Supreme Court, U. S.
FILED
MAR 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-337

FRANK DORAN, Individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-337

SALEM INN, INC., M & L REST, INC., and TIM-ROB BAR, INC.,

Plaintiffs-Appelees,

against

LOUIS J. FRANK, Individually and as Police Commissioner of Nassau County, FRANK DORAN, Individually and as town attorney for the Town of North Hempstead and HOWARD EINHORN, Individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 501 F.2d 18. The opinion of the United States District Court for the Eastern District of New York is reported at 364 F. Supp. 478.

Jurisdiction

The final judgment of the United States Court of Appeals for the Second Circuit was entered June 25, 1974 (J. S. 1a). Notice of Appeal to this court was filed with the Court of Appeals on August 8, 1974 (J. S. 27a*). This appeal was docketed by filing a jurisdictional statement on September 25, 1974, and this court noted probable jurisdiction on January 20, 1975. The jurisdiction of this court rests, on 28 U.S.C. 1254(2), because the Circuit Court of Appeals has held a state statute repugnant to the United States Constitution. A municipal ordinance (Local Law) is a state statute under 28 U. S. C. 1254(2). *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77 (1958); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134 (1962); *Stern & Gressman*, Supreme Court Practice, 31, 32 (1969).

Questions Presented

1. Whether the Town of North Hempstead may constitutionally prohibit "topless dancing"?

2. Whether the traditional rules of comity and equity required the Federal courts to abstain from exercising their jurisdiction where a state criminal proceeding was commenced one day after plaintiffs commence Federal Civil Rights Action for injunctive and Declaratory relief in the United States District Court?

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* References to "J.S." are to the Jurisdictional Statement. References to "A" are to the single appendix.

Relevant Provisions of Local Law No. 1 of 1973 of the Town of North Hempstead

Town of North Hempstead

Local Law No. 1 of 1973

A Local Law Prescribing the Regulation of Cabarets, Bars, Loungers, Dance Halls, Discotheques and Other Public Places in General.

Section 1.0—Legislative Purpose

It is hereby declared the policy of the Town Board of the Town of North Hempstead, County of Nassau, State of New York, that in order to preserve public peace and good order, and to safeguard the health, safety, welfare and morals within the unincorporated area of the Town of North Hempstead, it is necessary to regulate and control the operations of public places used as cabarets, bars or lounges, dance halls, discotheques and other public places in general so as to fix certain responsibilities and duties of persons owning, operating or controlling such establishments and of persons employed, whether for hire or not, in such establishments.

Section 2.0—Definitions

1. Public Place—Any room, place, or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes: or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term "public place", where used in this law, shall include the term "public assembly" or "assembly" as may be used in other codes, laws, ordinances, rules or regulations, as may be applicable in the Town of North Hempstead.

2. Cabaret—Any public place directly or indirectly selling or serving food, drink, or alcoholic beverages to the

public and in which any musical entertainment singing, dancing in a designated area, or other form of amusement is also permitted, and shall include such a room, place, or space which provides incidental musical entertainment by mechanical devices with or without dancing.

3. Bars, Lounges or Discotheques—Any public place in which the business of directly or indirectly selling and/or serving food, drink, or other beverages to the public is conducted and in which any musical entertainment, singing, dancing in a designated area or other form of amusement is also permitted, and shall include such a room, place or space which provides incidental musical entertainment by live musicians or mechanical devices with or without dancing.

4. Dance Halls—Any public place in which dancing is carried on and to which the public may gain admittance either with or without the payment of a fee.

5. Person—An individual, partnership, club, association, corporation, society, or any other organized group of persons and shall include officers, directors, stockholders, partners and trustees of a club, corporation, partnership, association, or society.

6. Town of North Hempstead—The unincorporated area of the Town of North Hempstead, County of Nassau, State of New York.

SECTION 3.0—PROVISIONS

1. It shall be unlawful for any person conducting, maintaining, or operating a cabaret, bar and/or lounge, dance hall, or discotheque, or any other public place within the Town of North Hempstead to suffer or permit any waitress, barmaid, entertainer, or other persons who comes in contact with, or appears before, or is likely to come in contact with or appear before persons with breasts uncovered in such a manner that the position of the breast below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly

covered or draped as to appear uncovered; or to appear in any scene, sketch, act or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. References to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

2. It shall be unlawful for any person to appear in any cabaret bar and/or lounge, dance hall, or disclotheque or any public place with breasts uncovered in such a manner that the portion of the breasts below the top of the areola is not covered with a fully opaque covering, or the lower part of the torso uncovered or so thinly covered or draped as to appear uncovered; or to appear in any scene, sketch, act, or entertainment with breasts or the lower part of the torso uncovered or so thinly draped as to appear uncovered. Reference to breasts in this section refers to females only. Reference to the lower part of the torso refers to both male and female.

SECTION 4.0—PENALTY

Any person who shall violate any section of this local law shall be guilty of a violation punishable by a fine not exceeding Five hundred ($500.00) Dollars, or imprisonment for a period not to exceed fifteen (15) days or both. Each day's continued violation shall constitute a separate violation.

SECTION 5.0—EFFECTIVE DATE

This local law shall take effect immediately upon the filing with the Secretary of State.

Dated: Manhasset, New York, June 10, 1973.

BY ORDER OF THE SUPERVISOR AND THE TOWN BOARD OF THE TOWN OF NORTH HEMPSTEAD
WILLIAM H. RYAN, JR.
Town Clerk

MICHAEL J. TULLY, JR.,
Supervisor.

Facts

North Hempstead is a town located in northwest Nassau County on Long Island, New York, and has a population of some 242,000 persons. It is adjacent, on its western boundary to the Borough of Queens, City of New York.

On July 10, 1973, after publication of a proposed local law, a public hearing was held and Local Law No. 1 of 1973 was unanimously adopted by the Town Board and filed with the Secretary of State of the State of New York, and became effective July 16, 1973. Local Law No. 1 of 1973 makes it unlawful to offer, present or perform what is commonly known as "topless dancing" in bars, lounges, cabarets, dance halls, discotheques or any other public place within the Town of North Hempstead (A 13).

Plaintiffs, Salem Inn, Inc., Tim-Rob Bar, Inc., and M & L Rest, Inc. own and operate bars in the Town of North Hempstead in which "topless dancing" is provided as "entertainment" to its patrons. After the effective date of Local Law No. 1 of 1973, the plaintiffs made their "entertainers" wear bikini tops so as to comply with Local Law No. 1 of 1973 (A 15).

On August 9, 1973, plaintiffs commenced an action for a declaratory judgment and moved by order to show cause for a preliminary injunction and temporary restraining order against enforcement of Local Law No. 1 of 1973 in the United States District Court for the Eastern District of New York. A hearing on the application for a temporary restraining order was held before Judge Dooling on August 14, 1974. Judge Dooling refused to issue a stay of enforcement of Local Law No. 1 of 1973. Argument on the motion for a preliminary injunction was set for August 17, 1974.

After the complaint in the action for a declaratory judgment was filed, and the request for a temporary restraining

order was denied, but before a hearing on the motion plaintiff M & L Rest, Inc. undertook to violate Local Law No. 1 of 1973 by once again providing topless dancing. On August 10, 1974 at 9:25 P.M. the Port Washington Police issued summonses for violation of Local Law No. 1 of 1973 to M & L Rest, Inc., to the owner thereof and its employees who were dancing.

On September 26, 1973, U.S. District Court rendered its decision holding Local Law No. 1 of 1973 unconstitutionally overbroad on its face in the declaratory judgment action and enjoined the enforcement thereof pending further proceedings. Defendant, Frank Doran, appealed to the United States Court of Appeals for the Second Circuit which rendered its decision on June 26, 1974 affirming the decision of the United States District Court, one judge dissenting.

Statement of changes in circumstances during pendency of the appeal

Pursuant to recommendation in Stern & Gressman, Supreme Court Practice 592, counsel for the appellant calls the Court's attention to certain facts reflecting upon this appeal which occurred during the pendency of the appeal, and prior to this Court noting probable jurisdiction.

On July 24, 1974, the Town of North Hempstead enacted Chapter 11 of the Code of the Town of North Hempstead, which law prohibited nudity in certain specifically enumerated places. This section of the Code of the Town of North Hempstead did not repeal Local Law No. 1 of 1973, to be considered upon this appeal.

This chapter of the Code of the Town of North Hempstead was held unconstitutionally overbroad as violative of the First and Fourteenth Amendments of the Constitution of the United States on September 10, 1974, by the United States District Court for the Eastern District of

New York. *Salem Inn, Inc.* v. *Frank,* 381 F. Supp. 859 (1974). In order to comply with the Federal Rules of Appellate Procedure a notice of appeal was filed and the appeal is in progress in the Second Circuit Court of Appeals. At pre-appeal conference held February 25, 1975 Appellant informed the Second Circuit that because of the pendency of this appeal, and because this Court has noted probable jurisdiction, Appellant would request argument in the Second Circuit be postponed until this Court renders its decision in this case.

The existence of Chapter 11 of the Code of the Town of North Hempstead and the proceedings in connection therewith does not, it is submitted, render this appeal moot for three reasons:

Firstly, the Code of the Town of North Hempstead did not repeal or effect the provisions of Local Law No. 1 of 1973 which is the subject of this appeal.

Secondly, issues presented in this appeal will be dispositive of the issues in the appeal of the decision overturning Chapter 11 of the Code of the Town of Hempstead. Disposition of the issues on this appeal in favor of constitutionality of Local Law No. 1 of 1973 will dispose of the necessity to proceed further in the case relating to Chapter 11 of the Code, because the questions therein will be rendered moot. Disposition of the issues of this appeal against the constitutionality of Local Law No. 1 of 1973 will resolve the issue whether topless dancing may be excluded by legislation on a local level. It will be unnecessary to proceed further in the Circuit Court of Appeals.

A question of the Federal interference with State administration of law is an issue to be resolved upon this appeal. The decision of the Second Circuit Court of Appeals allows any local law to be challenged at will in a federal forum upon the assertion of interference with constitutional rights, automatically divesting State courts of any right to review.

There is now a continuing controversy over restrictive legislation, enacted in furtherance of the health, safety and welfare of the municipality. So long as this controversy exists this appeal is not moot. See *Dunn* v. *Blumstein,* 405 U.S. 330; *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498; *Roe* v. *Wade,* 410 U.S. 113.

Summary of Argument

Point I will argue that Local No. 1 of 1973 of the Town of North Hempstead is a valid exercise of the police powers of the municipality, based upon a compelling governmental interest, is non-censorial and is no greater than necessary to accomplish its ends. That the legislative means chosen to further the health, safety and welfare of the community should not be subject to judicial review. Therefore, Local Law No. 1 of 1973 is constitutional.

Point II will argue that the definitions contained in Local Law No. 1 of 1973 sufficiently limit its application. By general rules of construction, this local law is sufficiently narrow so as to limit its application to conduct properly within the realm of regulation by the Town. The Courts below failed to properly construe Local Law No. 1 1973 and should be reversed.

Point III will argue that the application of the principles of overbreadth review in each court below was erroneous. Traditionally reserved to laws interfering with pure speech, the courts below extended this powerful exception beyond the narrow purpose for which it was created. As a result the Courts below granted Appellees relief not within the intent of the doctrine of overbreadth, and therefore the decisions should be reversed.

Point IV will argue that traditional principles of comity and equity render the decision of the District Court an unwarranted invasion into state criminal processes. The factual setting of the case at bar required a closer scrutiny.

The Circuit Court's reasoning in sustaining the District Court's decision further complicated the issue by establishing a "rush to the courthouse rule" which will create serious friction between Federal Courts and State Courts. Therefore, the decisions below should be reversed and the injunction lifted to allow the State prosecutions to proceed.

POINT I

Local Law No. 1 of 1973 of the Town of North Hempstead is constitutional.

In furtherance of the health, welfare, safety and good order of society, government of every level may legislate that which it deems proper to achieve this end. Police powers of government and their legitimate exercise are recognized in our law. *Boraas* v. *Village of Belle Terre,* 416 U.S. 1 (1974); *Street* v. *New York,* 394 U.S. 576 (1968); *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926). The legislative function of local government has traditionally been involved in the furtherance of the health, safety and welfare of the community which it serves. Local Law No. 1 of 1973, which was directed to the prohibition of "topless dancing" (A-13), was a proper and valid exercise of the police powers in furtherance of the legitimate governmental interest of the Town of North Hempstead.

The legitimate and compelling interests of government, as fostered by legislative enactments, may, if necessary, encroach upon individual interests and freedoms. Even those rights which are specifically guaranteed by the United States Constitution are not exempt from subservience to a compelling interest of Government. *United States* v. *O'Brien,* 391 U.S. 367 (1968).

Local Law No. 1 of 1973 of the Town of North Hempstead (A-11), prohibited nudity in specifically defined public places within the Town's territorial jurisdiction and was directed to end the public outcry against the establishments

which offered topless dancing as "entertainment" in furtherance of their economic interest (A-16, A-17-A-20). It is submitted that Local Law No. 1 of 1973 is a valid enactment of the legislature of the Town of North Hempstead, notwithstanding plaintiffs' claims that it abridges their constitutional rights of freedom of speech. Each of the courts below ruled the Local Law to be in violation of plaintiffs' rights upon the grounds the same was "overly broad," so as to . . . "'sweep within its ambit other activities that in ordinary circumstances constitute an exercise of Freedom of Speech.' *Thornhill* v. *Alabama,* 310 U.S. 88 (1940)" (J.S. 22a).

In reviewing Local Law No. 1 of 1973, it must be considered in the light of the forces which precipitated the legislation. The nuisance created by the bars offering topless "entertainment" is amply documented in the transcripts of the public hearing held prior to enactment of Local Law No. 1 of 1973 (A-29). Compelled by the necessity to act in accordance with the mandates of its populace in a substantially residential and suburban environment, suffering from the nuisances caused by the establishments—such as litter, noise, patrons' conduct, congestion, and proximity to schools where young children were in attendance—the Town Board adopted Local Law No. 1 of 1973. The elimination of the source of these nuisances was a most compelling governmental concern and interest.

The term "compelling governmental interest" is relative. A small municipality may have concerns which on a national scale would seem *de minimis.* These concerns are not so small to the municipality. A municipality must deal with the most basic elements of day to day living. It must provide for garbage removal, repair of streets and roads, and the enforcement of its zoning laws. The abatement of a nuisance in furtherance of the community welfare is a legitimate and compelling governmental concern. It is critical to the municipality that such con-

cerns be examined in relation to its day to day responsibilities and needs.

It was proper to exclude topless dancing by prohibition of nudity in "Bars, cabarets . . . or any other public place" (A-11). The method exercised by the legislative body to insure the health, safety and well-being of the community, is not a proper subject for review by this Court. The legislative discretion is supreme. *Boraas* v. *Village of Belle Terre,* 416 U.S. 1 (1973); *United States Civil Service Commission et al.* v. *National Association of Letter Carriers, AFL-CIO et al.,* 413 U.S. 548 (1973); *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926).

The decisions below are a departure from the principle that an overbreadth adjudication is a limited "exception to the traditional rules of practice." *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973).

Local Law No. 1 of 1973, undercut the nuisance at the source. The bar or cabaret, which created the problem could no longer provide this "entertainment." It was nothing more than a law directed at the source of the problem, which appellees sought to overturn. Misapplication of the rules of construction in the District Court, read into Local Law No. 1 of 1973 a far greater sweep, than its framers intended. (Point II, *infra.*) There was no ban on dancing, or providing entertainment, nor did it close the door of the established business. Its sweep was limited to what the legislature determined was a serious source of disruption to peace, good order, health and welfare of the Town of North Hempstead (A-11).

POINT II

The court below improperly construed the purpose and scope of Local Law No. 1 of 1973.

The Federal District Court for the Eastern District disregarded a well-established rule of statutory construction

when it held that Local Law No. 1 of 1973 was unconstitutionally overbroad. The court stated, in part:

> There is no limit to the interpretation of the term "any public place". It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance. The ordinance would also prohibit the production of the musical performance "Hair", which included a female topless performer but was protected against prosecution under a Massachusetts obscenity statute. See *P.B.I.C., Inc.* v. *Byrne, supra.* We, therefore, believe that on its face as drawn the ordinance is constitutionally invalid as an infringement upon plaintiffs' First Amendments freedoms. (J.S. 22a)

This statement by Judge Bartels ignores the rule of statutory construction known as *ejusdem generis.* Judge Bartels construed the ordinance to be overbroad because the term "any public place" could have myriad meanings. This is not true. The term "any public place" must be construed in the context of the terms that surround it. The general term is qualified and limited by the specific terms which precede it. This is rule of *ejusdem generis.*

> The *ejusdem generis* rule of statutory construction requires the court to limit general language of a statute by specific phrases which have preceded the general language, but the rule will not be applied where it contradicts the evident intent of the legislature. *McKinney's Consolidated Laws of New York Annotated, Statutes* § 239.

Under the rule of *ejusdem generis* the last phrase is confined to the subject matter in the phrases which preceded it.

In order to discern the true scope of the term in question, the District Court should have referred to the statement of legislative purpose which prefaced the ordinance. In that statement of legislative purpose, the term "other public places in general" is preceded by terms which are of such a nature as to confine the applicability of this ordinance to bars, lounges, discotheques, cabarets and dance halls (A. 11). There is no merit to the assertion that the terms could include, *inter alia*, a theater or an opera house. Therefore, such performance as "Hair" or the "Ballet Africains" would not be prohibited by Local Law No. 1 of 1973.

We respectfully submit that since the District Court felt that an exegesis of the term "any public place" would be dispositive of the issues of the constitutionality of Local Law No. 1 of 1973, under the maxim of ejusdem generis, it should have focused its analysis on the terms that preceded it, with the emphasis on the statement of legislative purpose. The court, however, chose to interpret the term independent of its surrounding terms and this resulted in a misapprehension of the true scope of the ordinance.

POINT III

The doctrine of overbreadth, reserved to questions involving pure speech, was erroneously applied to this case by the courts below.

Appellant urged in the courts below that appellees should establish that the legislation is overboard as applied to them (A-10). "As applied" is the cornerstone of such examination. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The sweep of Local Law No. 1 of 1973 is no greater than is necessary to achieve its legitimate end. See Point II, *supra*, *United States* v. *O'Brien*, 391 U.S. 367 (1968). It is submitted that the preamble and the body of the legislation manifest the intent of the legislature to prohibit topless dancing. The specific conduct prohibited cannot be questioned upon the readiing of the statute, nor can it be said that the statute is vague so as to prevent men of common intelligence to discern its meaning. *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926).

Each court below overlooked these considerations and erroneously concluded that the ordinance was overbroad.

This Court has recognized the distinction between purely verbal expression and expression incidental to conduct. *United States* v. *O'Brien*, 391 U.S. 367 (1968). The motion ". . . that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea" must be rejected. 391 U.S. 367. at 376. In *California* v. *La Rue*, 409 U.S. 109 (1972), this Court relying on *O'Brien*, upheld the validity of the California State Liquor Authority's regulations prohibiting topless and bottomless dancing in bars. The issues in this case are nearly identical and rely for resolution upon recognition of the dichotomy of pure speech and "speech-plus conduct", which is of paramount importance in expression cases. As expression devolve from pure speech toward pure conduct, the protection afforded decreases respectively, by degree. Dancing, even nude dancing, is conduct which in certain cases may contain elements of expression. To the extent it is expression, it is afforded First Amendment protection (J.S. 4a). *California* v. *La Rue* 409 U.S. 109 (1972). However, as conduct, the incidental expressive elements contained in topless dancing will yield to compelling governmental interests.

It is evident that the prohibitions contained in Local Law No. 1 of 1973 are directed towards conduct and not towards pure speech. Where conduct is the subject of the regulations, even if it contains elements of expression, the

legislation will be constitutionally valid, where it is merely an incidental interference, seeking to further a compelling governmental interest which can not otherwise be obtained. *United States* v. *O'Brien,* 391 U.S. 367 (1968).

Local Law No. 1 of 1973, is directed toward conduct rather than pure speech. *California* v. *La Rue,* 409 U.S. 109 (1972). Where conduct is involved, in order to establish overbreadth, there must be demonstrated, that the statute challenged interferes with protected activity, and that interference is not only real, but substantial. *Broadrick* v. *Oklahoma,* 416 U.S. 601 (1973).

Topless dancing contains a minimal amount of expression. *California* v. *La Rue,* 409 U.S. 109 (1972). It is only because this type of entertainment is in form "dancing", that it even adopts the color of expression. It must be concluded that topless "dancing" contains expression, which is "incidental". *California* v. *La Rue,* 409 U.S. 109 (1972). Various jurisdictions throughout the United States have adopted the position that topless dancing constitutes no more than the "commercial exploitation of nudity" thus reducing the expressive elements even further. *Wayside Restaurant, Inc.* v. *City of Virginia Beach,* 215 Va. 231, 208 S.E. 2d 51 (Supreme Court of Virginia 1974); *Seattle* v. *Hinkley,* 83 Wash. 205, 517 P. 2d 592 (Supreme Court of Washington 1973); *Crownover* v. *Musick,* 9 Cal. 3rd 405, 107 Cal. Rptr. 681 (Supreme Court of California 1973) (cert. den. 415 U.S. 931, 1974); *Yauch* v. *State of Arizona,* 19 Ariz. App. 175, 505 P. 2d 1066, 1973; *Major Liquors, Inc.* v. *City of Omaha,* 188 Neb. 628, 198 N.W. 2d 483 (Supreme Court of Nebraska 1972); *Portland* v. *Derrington,* 253, Ore. 289, 451 P. 2d 111 (Supreme Court of Oregon 1969) (cert. den. 396 U.S. 901, 1969); *Brandon Shores, Inc.* v. *Incorporated Village of Greenwood Lake,* 68 Misc. 2d 343, 325 N.Y.S. 2d 957 (Supreme Court Orange Co. 1971).

It is submitted, that because topless dancing is conduct with little, if any, expressive elements, it is not afforded absolute protection by reason of the First Amendment of

the Constitution. The Town of North Hempstead, therefore, may properly exclude this form of "entertainment" from its territorial jurisdiction as a proper exercise of the traditional police powers, based upon a compelling governmental interest.

Appellees have asserted that Local Law No. 1 of 1973 is overbroad "as applied". In order to establish overbreadth, it must be shown that the statute as applied, substantially interferes with constitutionally protected activity. *Younger* v. *Harris,* 401 U.S. 37 (1971). Substantiality of the interference is dependent upon the balance struck between the compelling governmental interest, furthered by the legislation, and the quantum of expression contained in the conduct prohibited. *United States* v. *O'Brien,* 391 U.S. 367 (1968). The error of the Courts below is grounded upon their failure to find the legislation overbroad "as applied" to appellees. The District Court, examined Local Law No. 1 of 1973 in its possible applications to conduct in which plaintiffs were admittedly not engaged. The application of an *Oklahoma* statute to other political conduct by civil servants, such as the wearing of political buttons and use of bumper stickers on personal automobiles, was not relevant, because no plaintiff then before the court had been subject to such restrictions. Prospective application of the statute will not be considered. Overbreadth adjudication is limited to the application of the statute to the conduct of the plaintiffs. *United States Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548 (1973); *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973).

There is no novelty to this rationale. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). Overbreadth has always been an "exception to traditional rules" and limited to statutes which are aimed at spoken words. *Gooding* v. *Wilson,* 405 U.S. 518 (1972).

In these cases, this "strong medicine" has been administered "sparingly". *Broadrick* v. *Oklahoma,* 413 U.S.

601 (1973) at 613. A limiting construction or partial invalidation that may be applied to the statutes also removes the applicability of the overbreadth rules. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *California* v. *La Rue,* 409 U.S. 109 (1972); *Younger* v. *Harris,* 401 U.S. 37 (1971); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). In this light, appellees claim that Local Law No. 1 of 1973 would prohibit "Les Ballets Africans" or "Hair", cannot be the basis for a determination of overbreadth, because of the prohibition against vicarious assertion of the rights of others.

Similarly, appellees' conduct, nude dancing in the bar, would be prohibited no matter how narrowly the statute is construed. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). They do not stand in some nebulous area, in doubt of what they are or are not permitted to do. From at least the time the action was commenced, appellees knew what they could not do (A-16, A-17, A-19). Overbreadth assumes the applicability of a statute, to a plethora of conduct, some of which is, or may be protected by the constitutional guarantees. "A Chill" results from foregoing the exercising one's constitutional rights for fear the law will apply and hence constitute a violation. *Younger* v. *Harris,* 401 U.S. 37 (1971). "A Chill" cannot result unless a statute is overbroad in the sense that those who are affected cannot discern with certainty whether or not the law applies. It must be shown *ab initio* the activity is protected activity, and without possibility of regulation by some other narrowly drawn law. *Younger* v. *Harris,* 401 U.S. 37 (1971), at 47 n. 4. As the conduct prohibited more closely approaches that, which a state could validly prohibit by law, the further that conduct will move from inherent uncertainty of laws applicability. *California* v. *La Rue,* 409 U.S. 109 (1972).

Appellees cannot claim "facial overbreadth" of Local Law No. 1—1973. As applied to appellees, Local Law No. 1 of 1973 is a constitutional, incidental, and non-censorial limitation on conduct with minimal elements of expression.

POINT IV

The rule established in the Court below contravenes the traditional considerations of comity and equity, and will result in needless friction between State Courts and Federal Courts by creating "unseemly races" to the Federal Courts, in order to divest State Courts of any chance to dispose of issues, of constitutional claims in criminal matters.

Issues in this case relating to relationship of Federal Courts and State Courts, and the exercise of jurisdiction by courts below, raise serious questions which leave unchecked the possibility of serious friction between the two. Basic considerations of equity and comity, long standing in the relationship of Federal and State Courts, has recognized the supremacy of each within its delegated sphere.

Federal injunctive relief, so drastic a remedy, has been, in most cases avoided, where State criminal processes were already in motion at the time Federal action was instituted. In *Younger* v. *Harris,* 401 U. S. 37 (1971), at 45. This action raises a question as to the propriety of a Federal Court's action which results in the arrest of a state criminal action brought in good faith.

The propriety of injunctive and declaratory relief against state criminal proceedings has been examined by this Court in *Younger* v. *Harris,* 401 U. S. 37 (1971), and its companion cases, *Samuels* v. *Mackell,* 401 U. S. 66 (1971); *Boyle* v. *Landry,* 401 U. S. 77 (1971); *Perez* v. *Ledesma,* 401 U. S. 81 (1971); *Dyson* v. *Stein,* 401 U. S. 200 (1971); *Steffel* v. *Thompson,* 415 U. S. 452 (1974), was interpreted as a discretionary void in which the Court below assumed it was free to establish guidelines as to when interference with state judicial processes was proper. In this case this new "clear cut, reliable and equitable guide" (J.S. 7a) has resulted in an unwarranted extension of federal interference with state judicial processes.

Comity has in most instances minimized the friction between the Federal and State courts. When questions of Federal deference to State courts have arisen, considerations of equity have always been paramount in resolving the issue or conflicts. The determination of whether or not a Federal Court should abstain should examine every equitable reason to act or defer in each individual case. In this case we submit that equitable considerations should have determined the issues in favor of Federal absention. The State prosecution of intentional overt violation of a local law, entitled to the presumption of constitutionality, has been instituted one day after filing of a complaint in the Federal Court.

In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the availability of Federal injunctive relief against a state criminal statute was expanded and the rules clarified to make available against prior state proceedings upon showing that certain specifically defined circumstances existed mandating its powerful use. *Younger* and its companion cases crystallized the rules established in *Dombrowski,* by application of these principles of equity to individual cases in order to determine, in each such instance, if plaintiff had established sufficient facts to warrant Federal injunctive relief. In application of principles of *Dombrowski,* and specifically in the case of *Younger,* this Court noted that demonstration of "overbreadth" alone is not sufficient to warrant such powerful intervention, absent the "extraordinary circumstances" of irreparable injury, and demonstrative evidence of bad faith and harassment.

No such claim of bad faith or harassment was presented in the courts below. A determination of the irreparable injury was a factor considered by each court below in application of the *Dombrowski* rationale to the plaintiffs herein (J.S. 4a). A showing of irreparable injury does not of itself justify Federal intervention without bad faith, and harassment. *Younger* v. *Harris,* 401 U.S. 37 (1971). *Younger* mandates a far more powerful case be presented

by plaintiffs, demonstrating great and immediate irreparable harm. The mere allegations of appellees in the district court, it is submitted, were not sufficient to bring them within this exception in *Dombrowski.*

More important than the misapplication of these principles, is the result obtained by reason of these guidelines established by the court below (J.S. 7a). The race to the courthouse door, (cf. Dissenting Opinion of Lumbard, J. (J.S. 10a)) inherently overlooks the safeguards afforded all parties by *Younger's* application of *Dombrowski's* principles.

A case by case evaluation is required for each federal court called to review a statute, under which no state proceeding had commenced, in order to determine if the requisites of *Dombrowski,* were present. If its existence were established, it is unquestioned that federal intervention would be proper in favor of a person who would suffer immediate harm and irreparable injury. However, what hardship may arise incident to every state prosecution, is of itself insufficient to justify equitable relief. *Dombrowski,* 380 U. S. 379 (1965); *Younger* v. *Harris,* 401 U. S. 37 (1971). Likewise, mere overbreadth, claimed by plaintiffs, based on a "chill" may occur to others, cannot alone justify Federal intervention. (*Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973); *United States Civil Service Commission, et al.* v. *National Association of Letter Carriers, AFL-CIO, et al.,* 413 U. S. 548 (1973).

The danger of the rule created by Court below, is manifest. Even when first presented with the case, Federal Courts should closely examine the underlying facts and circumstances of each case, which examination should continue throughout the proceedings. *Younger* v. *Harris,* 401 U.S. 37 (1971) at 49.

A more compelling reason to abstain can be found in the fact that one plaintiff began to violate Local Law No. 1 of 1973 one day after the District Court refused to issue a

temporary restraining order (A-21). If equitable considerations are determinative of borderline cases, as the Circuit Court plainly ruled (J.S. 3a), one who seeks equity must come to court with clean hands. The court below found two of three plaintiffs to have clean hands, and refused to deny relief to the third. In justification of its action, the court below relied upon this Court's decision in *Steffel* v. *Thompson,* 415 U.S. 452. (1974).

Steffel is distinguishable from the instant case in that only the propriety of declaratory relief was in issue; plaintiffs therein had standing to challenge the statute "as applied," and not upon some speculative applications of the law, to the derogation of rights other than their own. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1974).

In this case prosecutions were self-generated. Because Local Law No. 1 of 1973 was not unconstitutional "as applied," the fact of the existence of state proceedings, even though initiated one day subsequent to the filing of this action, should have propelled the consideration of the District Court in favor of referring to the state adjudication. *Younger* v. *Harris,* 401 U.S. 37 (1971). The constitutionality could have and should have been determined in that forum.

The Court below had knowledge of the pending state prosecution (A-21). The courts below could have—at any stage of the proceedings—released the claims to the state courts. *Younger* v. *Harris,* 401 U.S. 37 (1971), Steffel does not stand for the proposition that once an action is commenced, a violation of the law can be *ignored,* especially in light that comity demands the Federal Court recognize the capability of the State Court to fairly dispose of every issue, even those of constitutional infringement. *Douglas* v. *City of Jeannete,* 319 U.S. 157 (1943).

Compounded as it is by the error of the District Court in application of the rules of overbreadth determinations (though not controlling), *Steffel* v. *Thompson,* 415 U.S.

452 (1974), some consideration should have been given to whether or not the State Court could have with similar speed and justice made a dispositive decision on the merits of appellees' claims in the criminal proceeding (J.S. 11a). In the very broadest of reading of the rules in Steffel, the courts below should have abstained as to M & L Rest, Inc. The rule the Court of Appeals has established renders an immediate divestiture of state powers of enforcement of any criminal statute upon the filing of the Federal complaint for declaratory relief (J.S. 14). Even if a plaintiff chances losing in the Federal Courts, and thus faces eventual prosecution, the converse of the state being stayed in enforcing the law through the time of pendency of the Federal declaratory action and appeals therefrom may be far more disruptive to order, society and welfare. A more drastic interference with State criminal processes is difficult to imagine. It is, therefore, more compelling to allow the state to proceed, than to tie the hands of state prosecutors (J.S. 14a). The "Alphonse-Gaston routine" (J.S. 7a), cannot result and we must assume local prosecutors will respect the law. *Steffel* v. *Thompson,* 415 U.S. 452 (1974), therefore, must be read in its limited sense as in Mr. Justice Stewart's concurring opinion that, absent objective showing of a chill due to fear of arrest and some corroboration of the chill, the plaintiffs lack . . . "an actual concrete controversy between himself and the Agents of the State." The controversy in this case did not arise until after the federal action was commenced. It was created after the fact. Since the case at its inception lacks the controversy under *Steffel* rationale, the dissent in the Circuit Court demonstrates astute observation of the error, in ". . . the fact of which court is first presented with question seems a clear-cut reliable guide . . ." (J.S. 7a) creates "unseemly races . . ." (J.S. 12a). The absence of a hard and fast rule should not be decried because equity is by nature liquid. Comity is a two-way street of mutual respect and forbearance between the courts of the state and of the na-

tion. *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943). The Federal Court must recognize the capability of the State Court to fairly dispose of every issue, even those of constitutional infringement (J.S. 14a).

For these reasons, the courts below should have abstained, and remitted the determinations in this case to the courts of New York.

CONCLUSION

Local Law No. 1 of 1973 of the Town of North Hempstead is a constitutional exercise of the police powers, and the courts below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—337

FRANK DORAN, Individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLEES

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLEES

Questions Presented

Appellants pose two questions on this appeal. The first is "whether the Town of North Hempstead may constitutionally prohibit 'topless dancing'?" It is respectfully submitted that this is *not* the question which was determined below and which may be properly raised herein.

The question is not whether a local government may prohibit "topless dancing", but rather whether it may do so with an across the board, speech inhibiting, blunderbuss ordinance serving no compelling governmental interest.

As to the second question posed by appellants, whether a Federal Court may be *required* to abstain in a Civil Rights case by reason of the subsequent commencement of a state criminal prosecution under the attacked ordinance, this question has, at least as to injunctive relief, been determined by this Court within the past year in *Steffel* v. *Thompson*, 415 U.S. 452 (1974). In any event, the assertion of this doertine of *post facto jurisdictional divestiture* is quite novel, and unprecedented in law or reason. *The question, therefore, is whether the Federal Courts will abbrogate their responsibility to vindicate First Amendment Rights by granting declarative and injunctive relief with respect to an overbroad local law as to both federal plaintiffs who are not involved in state prosecutions initiated under the attacked law and federal plaintiffs whose employees became involved in such prosecutions after the filing of the federal action.*

The Ordinance

The ordinance does not, as appellants claim, prohibit "topless dancing". It prohibits in *all public places* the appearance of any person with *breasts* or the *lower part of the torso* uncovered even if such appearance be part of a "*scene, sketch, act or entertainment.*"

There is no public exhibition which is not engulfed by the ordinance. It covers a ballet, musical, legitimate show with or without dancing, acquatic display, swimming race, weight lifting contest, belly dance, modern dance, go-go dance, etc. It ensnares bikini wearers and plunging neckline wearers. It paints the Ballet Afrikans, musicals such

as "Hair", topless go-go dancers and nude sunbathers with the same brush. It makes the proprietor of a public place legally responsible for the attire of his patrons. It makes it a crime to uncover "the lower part of the torso" without defining precisely what area of exposure would fix liability.

The ordinance serves no legitimate or compelling state interest, since its alleged benefits could be achieved through enforcement of existing laws.

It does not, as appellants claim, merely prohibit "topless dancing." It would take dozens of state cases and years to limit its radiant scope. In the meanwhile, expression protected or presumptively protected by the First Amendment would be chilled and suppressed in the ephemeral cause of modesty, under the guise of morality and in the service of hypocrisy.

The Facts

Appellees are the owners and operators of bars in the Town of North Hempstead, Nassau County, State of New York, which provide and have for years provided, live topless dancing entertainment by professional dancers who perform on a stage in a decorous manner for the entertainment of forewarned consenting patrons (A-8, 9, 15-20).

On July 17, 1973, the Town of North Hempstead adopted Local Law No. 1—1973 (hereinafter referred to as the "Ordinance") which made unlawful the appearance of *any person* with uncovered breasts or lower part of the torso in *any public place* and in addition, made unlawful the permitting of entertainment involving the proscribed exposure in all public places. Within the scope of activities prohibited by the Law was the type of dancing entertainment provided in appellees' establishments. Because the ordinance made the entertainment offered by appellees unlawful, and because of their fear of prosecution should

they violate the ordinance, appellees ceased on the date that the ordinance became effective, to provide topless dancing entertainment for their patrons. This cessation caused appellees to sustain immediate severe economic loss, threatened them with insolvency and their employees with unemployment and deprived their patrons of the right to view the topless dance performances theretofore offered at the premises (A-15-20).

Faced with the likelihood of going out of business, appellees filed an action under the Civil Rights Laws to declare the ordinance unconstitutionally overbroad in violation of the First and Fourteenth Amendments and sought a permanent injunction against its enforcement. At the same time they applied, in vain, for the issuance of a temporary restraining order.

Thereafter, one of the three appellees, M & L Rest., Inc., faced with immediate economic ruin, resumed providing topless dancing entertainment for its patrons. Immediately a series of eight multiple, repetitive harassing criminal prosecutions were commenced by appellants against various of M & L's officers, managers and performers notwithstanding the fact that appellants were aware of the pendency of the federal action and the imminence of a determination of the constitutional issue raised therein (A-1). The remaining appellees obeyed the Ordinance attacked herein until the injunction was issued (JS-18a).

POINT I

The ordinance is unconstitutional.

The Ordinance Is Overbroad

Appellants argue in Point I that the ordinance "was directed to the prohibition of 'topless dancing' (A-13)." Whether this could have been accomplished by a narrowly drawn ordinance directed at the alleged evil sought to be

proscribed is not the issue herein.[1] What is the issue is whether the ordinance, on its face, regardless of its drafter's intention, is overbroad, i.e., "patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *State of Alabama,* 310 U.S. 88, 97-98. Cf. *Staub* v. *City of Baxley,* 455 U.S. 313"; *Smith* v. *California,* 361 U.S. 147, 151.

Appellants Deny The Basic Constitutional Principle That Legislation Inhibiting Expression Must Be Narrowly Drawn

The essence of appellant's Point I[2] is that:

> "The method exercised by the legislative body to insure the health, safety and well-being of the community, is not a proper subject for review by this Court." (Appellant's brief—Page 12).

Thus an overbroad argument is made to support this overbroad ordinance.

Appellants thereby deny that the Town of North Hempstead is a political subdivision within a constitutional democracy, asserting the right to legislate within their boundaries in derogation of the most fundamental liberties guaranteed by our Constitution. To say more on this subject would serve no purpose.

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[1] It appears undeniable that, however an offense be characterized under local law, obscenity requirements must be satisfied when the law proscribes expression by reason of its sexual orientation. *Miller* v. *California,* 413 U.S. 15; *Paris Adult Threatre* v. *Slaton,* 413 U.S. 49.

[2] See summary on Page 9 of appellants' brief and in the last sentence of the first complete paragraph on Page 12 of said brief.

Neither Legitimate Nor Compelling Governmental Interests May Be Fostered By Means Of Overbroad Speech Inhibiting Legislation

Appellants argue in Point I that the legitimate and compelling interests of the Town of North Hempstead to abate the alleged nuisances of litter, noise, patron's conduct (unspecified), congestion, and proximity to schools required the enactment of the Ordinance. They do not acknowledge that specific legislation directed against each and all of the foregoing "nuisances" has already been enacted in the laws of the State of New York, County of Nassau, and Town of North Hempstead. In a case involving the reenactment by the Town of North Hempstead of a second anti-nudity ordinance, Judge Bartels of the United States District Court of the Eastern District of New York, in his decision striking down the second ordinance, addressed himself to this nuisance argument and stated,

> "The challenged ordinance plainly covers a field much wider than is essential to further the Town's interest in dealing with the nuisance conditions complained of at the public hearing. Instead of dealing with the specific conditions, the ordinance focuses on an activity which can contain protected expression and which has not been shown to be the source of the problem. Similar problems of crowds, noise and litter are frequently presented by many forms of public entertainment such as sporting events, rock concerts, political rallies, etc., and it would be equally unreasonable to ban such events in order to correct problems which can be best attacked through regulation of zoning, parking, hours of operation, etc." *Salem Inn, Inc.* v. *Frank,* U.S.D.C., Eastern District of New York-74-C-1108, September 10, 1974.

Appellants claim that the ordinance "undercut the nuisance at the source." (Appellants' brief—Page 12). This

may be efficient yet impermissible. Appellants may not burn down the house to roast the pig. They may not outlaw prayer because of the noise and traffic congestion incident to Sabbath observance adjacent to Houses of Worship. They may not outlaw the publication of newspapers because of the noise of the presses and the congestion caused by delivery trucks. They may not outlaw political rallies because of the noise, litter, and congestion occasioned by the mass meeting. They may not outlaw shows by reason of the conditions necessarily occasioned by wide-spread public acceptance and attendance. This, however, is just what appellants claim they may do. Problems of where the public should be permitted to congregate are readily resolvable through zoning legislation. Problems of littering and noise are readily resolvable through specific penal legislation addressed to such subjects. Problems of traffic congestion are readily handled through traffic regulations. None of the foregoing problems are required or permitted to be resolved through the process which appellants refer to as an undercutting "at the source".

Overbreadth Adjudication Is Available Whenever A Law Is Susceptible Of Speech Inhibiting Application, As Is The Ordinance

Appellants note "that an overbreadth adjudication is a limited 'exception to the traditional rules of practice.' *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973)," yet they refuse to acknowledge that the ordinance, with its speech inhibiting prohibitions, was enacted within the area of just such an exception.

The complaint, Paragraph 13, alleges that the dancers who perform in plaintiff's premises are employed solely as dancers and perform no other function other than dancing on stages for the entertainment of the patrons (A-9). The moving affidavits make the same statements (A-16, 18, 20). The answer and responsive affidavits do

not dispute any of the foregoing other than by a denial of knowledge or information sufficient to form a belief (A-32). It cannot be denied that this dancing constitutes a theatrical performance or production protected by the First Amendment. *Southeastern Promotions Ltd.* v. *Conrad*, —— U.S. —— (March 18, 1975) 43 LW 4365; *Schacht* v. *U.S.*, 398 U.S. 58 (1970); *California* v. *LaRue*, 409 U.S. 109, at 118 (1972); *PBIC, Inc.* v. *Byrne*, 313 F. Supp. 757 (U.S.D.C. Mass. 1970-Three Judge Court) vacated on other grounds, 401 U.S. 987 and judgment vacated for reconsideration in light of *Miller, et al.*, 413 U.S. 905 (1973); *People* v. *Wendling*, 258 N.Y. 451.[3]

The First Amendment activity performed by the dancers upon the stages located in the appellees' premises constitutes the activity within the area which is thus conceded by appellants to be an "exception to the traditional rules of practice". *Broadrick* v. *Oklahoma, supra.* Nothwithstanding the foregoing, appellants treat the subject as if it were not within the First Amendment exception and is, therefore, not subject to overbreadth adjudication. They somehow reason that because a "municipality must deal with the most basic elements of day to day living . . . (and) must provide for garbage removal, repair of streets and roads, and the enforcement of its zoning laws . . . (and) it is critical to the municipality that such concerns be examined in relation to its day to day responsibilities and needs . . . it was proper to exclude topless dancing

[3] This subject is more fully treated in Point III hereof. As Judge Oakes noted, in footnote 3 of the majority opinion below (A-9a):

> "While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by Judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some entertainment with his beer or shot of rye."

by prohibition of nudity in bars, cabarets . . . or any other public place . . . (and) the method exercised by the legislative body to ensure the health, safety and well-being of the community, is not a proper subject for review by this Court" (Appellants' brief Pages 11 and 12).

If the responsibility for these local government functions can somehow be translated into the power to censor, inhibit and suppress expression, where is speech immune from censorship, prior restraint and criminal sanction, and where is the fundamental exercise of First Amendment rights sacrosanct?

Appellants argue at the end of Point I that they did not bar dancing or entertainment nor did they close the doors of appellees' businesses. No, they did not do that, they merely censored in advance the performances which could be exhibited in those premises as well as in all other public places within the Town.[4]

If The Ordinance Were Not Aimed At Diminishing Or Closing Appellees' Business, It Would Have No Relation At All To Its Purported Purposes

The evils of litter, noise and congestion sought to be remedied by the ordinance are evils incident to any public assemblage. If the ordinance were not meant to put the plaintiffs out of business or to substantially reduce appellees' patronage, those evils would remain uneffected by the Ordinance. The same is true of the alleged "nuisance" of unspecified patron's conduct which has no basis whatsoever in the record on appeal. As to the alleged evil of proximity to schools where young children are in attendance, there is no evidence in the record that the exhibition in plaintiff's premises could be viewed by such children nor does the across the board prohibition allow such ex-

[4] See the prior restraint discussion relating to *Southeastern Promotions, Ltd.* v. *Conrad* in Point III hereof.

hibitions in places which are not in close proximity to schools.[5]

Thus, it is apparent that the Ordinance in question, far from being required by any compelling governmental interest of the Town, cannot even be considered aimed at the evils which appellants claim it seeks to prohibit.[6]

Because of the organization of appellants' brief, the substantive issue of overbreath will be more fully discussed in Point III of this brief.

POINT II

The Court below properly construed the clear scope of the ordinance as proscribing nudity in all public places, by any person including performers of all types.

In Point II, appellants argue that the ordinance should be construed to be limited in scope to cabarets, bars, lounges, dance halls and discotheques and that despite the fact that (a) it specifically defines "public place," and (b) in its legislative purpose and proscriptive provisions it forbids the proscribed activity in "public places" as well as the above enumerated particular types of establishments, it was erroneously construed by the Court below

[5] In fact, Paragraph 14 of the complaint alleges, "only adults are permitted to enter the bars" (A-9), and this allegation is not contested other than by appellants' denial of sufficient knowledge or information to form a belief (A-32 and A-34). In any event, under New York Penal Law Section 235.21, it is a crime to expose indecent material to minors, and the definition of indecent materials includes nudity which under Section 235.20 includes substantially the same definition of an uncovered female breast as is set forth in the Ordinance.

[6] To the extent that the Ordinance could destroy appellees' businesses, it could be effective by removing the source of the alleged evils. This, it indicated, could be accomplished (See App. pp. 21, 23).

to forbid the proscribed activity in places other than cabarets, bars, lounges, discotheques and dance halls.

Even assuming that the preamble was the ordinance and was the only written matter to be construed, the words themselves belie the argument. It is, however, basic statutory construction that one reads first and foremost the statute, not the preamble and legislative purpose which are read only where there is an ambiguity in the statute.[7]

Section 2 of the ordinance sets forth the definitions of the various terms used, including the words "public place". Each defined word, term, or grouping of words is given a separate subdivision. "Public place" is defined in terms so broad that it could not conceivably be limited to the bars, lounges, discotheques and dance halls which appellant argues it must be limited to.[8] The definition includes every single theatre or place, indoors or outdoors, where any theatrical production could be given in the Town of North Hempstead.

Subdivision 1 of the definitions does not take coloration from any definition of a place which precedes it since Subdivision 1 is not preceded by any of the other subdivisions.

Assuming "public place" were not mentioned and defined in the ordinance at all, places defined in Subdivision 2, 3 and 4 are sufficiently broad to clearly include any place which could be used as a theatre or for purposes of public exhibitions. Virtually all theatres and places of public

[7] See: McKinney's Consolidated Laws of New York Annotated, Statutes 122.

[8] "Any room, place or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes; or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term 'public place', where used in this law shall include the term 'public assembly' or 'assembly' as may be used in other codes, laws, ordinances, rules or regulations as may be applicable in the Town of North Hempstead." (A-11 and A-12)

assembly and entertainment sell food or drink. Under the definition in 3, any theatre which has a food concession or soda machine would be subject to the proscriptions of the ordinance. By the definition of dance halls, any place in which there is an exhibition comprised in whole or part of dancing would fall within the ordinance.

In any event,

> "(O)ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[9]

It should be noted that were appellants' position relating to the construction of the words "public place" correct, and did there exist in the Town of North Hempstead places in which performances could be lawfully given by naked breasted performers, the ordinance would be subject to attack on equal protection grounds. In view of the clear meaning of the ordinance, little need be said about this point, other than to call to the Court's attention the fact that Judge Bartels, in striking down the successor ordinance which limited the scope of its proscription as herein suggested by appellants, declared the second ordinance violative of the equal protection provisions of the Fourteenth Amendment.[10]

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[9] *Schneider* v. *State,* 308 U.S. 147, 163; Quoted with approval in *Southeastern Promotions Ltd.* v. *Conrad, supra,* 4368.

[10] *Salem Inn, Inc.* v. *Frank, supra,* pp. 10-11 Sl. Op.: "Since the location classification here involves the exercise of fundamental rights protected by the First Amendment, the classification must again serve a 'compelling State interest' to withstand such an attack. *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *O'Neill* v. *Dent, supra.* While restrictions applied only to places serving alcoholic beverages have been upheld in certain circumstances involving the Twenty-First Amendment, *California* v. *LaRue, supra; Paladino* v. *City of Omaha,* 471 F. 2d 812 (Eighth Circuit 1972); *Salem* v. *Liquor Control Commission,* 298 N.E. 2d 138, 34 Ohio St. 2d 244 (1973), the ordinance here applies its restrictions to coffee shops, restaurants and even dance halls and discotheques. It is difficult to determine what compelling State interest would be served by an ordinance which would bar a production of 'Hair' at a cabaret and allow nude dancing in a burlesque theatre."

Thus, appellants' tortured construction of the clear words serves no purpose other than to subject the ordinance to additional attack under the equal protection clause of the Fourteenth Amendment.

It is respectfully suggested that Point II of appellants' brief involves no more than straw grasping.

POINT III

The ordinance on its face and as applied, is unconstitutionally overbroad in violation of the First and Fourteenth Amendments.

It is appellees' contention, upheld by both Courts below, that the ordinance is vague and overbroad in a First Amendment sense in that rather than being narrowly drawn to vindicate a compelling governmental purpose it constitutes a penal statute susceptible of sweeping and improper application, thereby threatening those who would properly exercise their rights of free speech, including appellees herein, with the expense and inconvenience of criminal prosecution.[11] As such, the ordinance is facially overbroad and violative of the First and Fourteenth Amendments. *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1947); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 599; *NAACP* v. *Button,* 371 U.S. 415, 432-433; *Thornhill* v. *State of Alabama,* 310 U.S. 88, 97-98; *Smith* v. *California,* 361 U.S. 147, at 151 (1959). *U. S.* v. *O'Brien, supra,* at 376; *Zwickler* v. *Koota,* 389 U. S. 241, at 250.

Futhermore, it is clear that, far from vindicating a compelling governmental interest, the ordinance serves no legitimate purpose.

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[11] Appellants, in the very first sentence of Point III of their brief, manifest an utter disregard or misunderstanding of appellees' position herein. The complaint clearly establishes that the attack upon the ordinance is not merely based upon the application of the ordinance but upon its facial invalidity as well. See: Paragraphs 19 and (1) of the complaint (A-9 and 10).

The Sweep Of The Ordinance Is Far Greater Than Necessary To Accomplish The Desired Governmental Ends

In the second sentence of their Point III, appellants contend that, "the sweep of Local Law No. 1 of 1973 is no greater than is necessary to achieve its legitimate end." They thereby concede that were the sweep of the ordinance greater than necessary to achieve the legitimate end sought thereby, the ordinance would be overbroad and unconstitutional.[12] Even if the foregoing were true, the ordinance is fatally overbroad. Appellants consistently maintain that the ordinance was directed solely against the litter, noise, congestion, proximity to schools and unspecified patrons' conduct occasioned by the existence of places within the Town of North Hempstead in which the proscribed activity takes place.

We have heretofore pointed out, as has the District Court, holding in the second *Salem Inn* case (*Salem Inn* v. *Frank, supra,* 74-C-1108) that all of the foregoing alleged evils can be readily controlled and abated by enforcement, enactment and/or amendment of the appropriate zoning and penal laws directed at each. It was neither necessary, appropriate nor constitutionally permissible to proscribe "the source of these nuisances" (Appellants' brief—Page 11) by means of an across the board prohibition effecting activity which is presumed to be expression protected by the First Amendment. It cannot be doubted that the State of New York, County of Nassau and Town of North Hempstead have sufficient laws already enacted to cope with the problems of litter, noise, or congestion adjacent to any public place. If these laws are not sufficient, additional legislation directed at the evils rather than

[12] Appellants have here substituted "legitimate ends" for "compelling interests." Were this not an ordinance effecting dissemination of expression presumptively protected by the First Amendment, they would be correct.

the source can be enacted. This is likewise true of the unspecified "patrons' conduct" alleged to be an evil. Similarly, the Town's right to enact zoning legislation forbidding certain types of establishments to exist in certain areas or in proximity to certain types of buildings such as schools or churches, is not disputed. How then can appellants allege that the sweep of the ordinance, admittedly enacted to eliminate the source of the foregoing alleged nuisances, is no greater than necessary to achieve such ends? It could reasonably be argued that even if the ordinance were not susceptible of sweeping and improper application with respect to the suppression of First Amendment rights it would still be violative of rights under the Fourteenth Amendment to operate a lawful business in a lawful manner. See: *Terrance* v. *Thompson,* 263 U.S. 197; *New State Ice Co.* v. *Liebmann,* 285 U.S. 262; *Truax* v. *Riach,* 239 U.S. 33; *Allgeyer* v. *Louisiana,* 165 U.S. 578.

We are not, however, concerned with local regulation of ordinary economic activity. We are here concerned with an ordinance aimed at and directly resulting in the censorship and suppression of theatrical productions performed on a stage in a public place. It cannot be overemphasized that the ordinance clearly proscribes in all public places the appearance of any person with breasts or the lower part of the torso uncovered even if such appearance be part of a "scene, sketch, act or entertainment". This ordinance is not limited to exposure of private parts in a street or park. It is not even limited to outlawing topless dancing. It relates to a ballet, dance, pantomime, modern rock concert with dancing, rock group ensemble, choreographed political satire, striptease with a storyline, dramatic show, and musical comedy. The ordinance covers every conceivable place in which such a performance could be given, including a theatre, auditorium, opera hall, meeting room, bar, cabaret, discotheque or any other place open to the public. It is all-encompassing, making no distinction between topless waitresses, improperly dressed patrons, and

artistic performers. It makes no distinction between obscene and non-obscene performances. It is, indeed, the broadest across-the-board prohibition imaginable and is, therefore fatally overbroad as such term has been defined in innumerable decisions of this Court.

As was said in *NAACP* v. *Button*, 371 U.S. 415, 432-433,

> "The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping an improper application."

It is the susceptibility of the sweeping and improper application of the ordinance which requires its invalidation.[13]

This overbreadth chills the exercise of First Amendment rights by deterring performers, including but not limited to dancers, from appearing bare breasted in all or a segment of their artistic performance. To require the Ballet Afrikans which performs bare breasted in their native land and in their exhibitions and performances throughout the world to don brassieres in the course of a performance in the Town of North Hempstead, as required by the ordinance, would serve no legitimate purpose other than the corruption of their performance. To require the actors and actresses in "Hair", when performing in the Town of North Hempstead, to cover their breasts and the lower part of their torsos would censor their performance and detract from its impact and artistic purpose. Examples too numerous to mention, including occasional baring of breasts in dramatic plays presently on and off Broadway, can be cited.

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[13] The ordinance is constitutionally overbroad since "It sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." ***Thornhill*** v. ***Alabama***, 310 U.S. 88, 97.

It would be no answer to this claim of overbreadth to say that the Ordinance would not be applied to such cases but only to appellants' performers. *Keyishian* v. *Board of Regents, supra,* at 599. It is the *susceptibility* of the sweeping and improper application of the ordinance to expressive matter presumptively protected by the First Amendment which requires the Ordinance's invalidation. *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974); *Keyishian* v. *Board of Regents, supra,* at 599; *NAACP* v. *Button,* 371 U.S. 415, 432-433; *Smith* v. *California, supra,* at 151.

This is not a case such as *Broadrick* v. *Oklahoma,* 413 U.S. 601, at 618, where the Ordinance had a few possible impermissible applications. It is an across the board prohibition against the baring of breasts in any public place as part of any endeavor, artistic or otherwise. It is facially overbroad.

The Ordinance Censors Protected Expression, Not Conduct

The essence of appellants' arguments under Points I and III amount to an assertion that the prohibition of the Ordinance is allegedly "directed to conduct" (Appellants' Brief—Page 15). Since, according to appellants' Point III, conduct is allegedly proscribed by the Ordinance, appellants' Point I argues that the Town may regulate such conduct under the police power in the same way that it regulates "litter, noise, . . . congestion, . . . garbage removal, repair of streets and roads, and the enforcement of its zoning laws." (Appellants' Brief—Page 11). Appellants are in error.

It should first be noted that this case does not involve zoning regulation. Hence *Boraas* v. *Village of Belle Terre,* 416 U.S. 1 (1973), and *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926), cited by appellants do not apply. This case does not involve prohibition of the burning of Selective Service Registration Certificates or the burning or mutila-

tion of any property for that matter. Hence *United States* v. *O'Brien,* 391 U.S. 367 (1968), does not apply. This case does not involve the regulation of the service or sale of liquor by the drink or otherwise. Hence *California* v. *LaRue,* 409 U.S. 109 (1972), with its Twenty-First Amendment implications, does not apply. This case does not involve the mere prohibition of bare breasted waitresses and other employees of drinking establishments who mingle with the patrons, auction off their undergarments, touch and are touched by the patrons, and perform no artistic exhibition. Hence, virtually every State case cited on Page 16 of appellants' brief does not apply.

What this case concerns is an ordinance which sets forth an across the board prohibition upon any breast exposure in any public place, including but not limited to censorship and prior restraint of the content and exhibition of theatrical performances. Since a theatrical production, like a motion picture, is protected by the First Amendment, *Southeastern Promotions* v. *Conrad, supra; Schacht* v. *United States, supra; California* v. *LaRue, supra,* it would seem obvious from a point of view of First Amendment analysis that a dance exhibition in public on a stage is undistinguishable from any other type of theatrical production. Can a distinction be drawn between dance routines based upon the locality of the stage on which each is performed? Can a distinction be drawn between dance routines based upon whether they are part of a Broadway musical, a rock concert, a ballet, or a one person recital? Can a distinction be drawn between a modern dance recital, a dramatic play, a lavish musical, a go-go dance exhibition, a belly dance exhibition, or any other type of theatrical production performed on a stage? If no such distinctions may be drawn among each of the various classes of theatrical productions heretofore referred to, are they not all presumptively protected by the First Amendment and protected from overbroad legislative interference with their content. See footnote 3 of majority opinion below (App. pp. 8a, 9a).

[14] In this case, unlike *Brandon Shores, Inc.* v. *Greenwood Lake,* 68 Misc. 2d 343, 32 N.Y.S. 2d 957, the First Amendment issue has been raised. Thus *Brandon Shores* certainly does not apply.

Recently, this Court has had occasion to review the issue of First Amendment protection of theatrical performances and local government attempts to restrain them.

In *Southeastern Promotions Ltd.* v. *Conrad, supra,* a municipality refused to permit the use of its public assembly facility for exhibition of a show which provided nude performances. This refusal was held by both the District Court and the Circuit Court to involve a constitutionally permissible limitation upon conduct, not speech. In the words of this Court, at 4367,

> "The District Court . . . concluded that group nudity and simulated sex would violate city ordinances and state statutes making public nudity and obscene acts criminal offenses. This criminal conduct, the Court reasoned, was neither speech nor symbolic speech, and was to be viewed separately from the musical's speech elements. Being pure conduct, comparable to rape or murder, it was not entitled to First Amendment protection . . . on appeal, the United States Court of Appeals for the Sixth Circuit, by a divided vote, affirmed . . . the majority relied primarily on the lower court's reasoning. Neither the Judges of the Court of Appeals nor the District Court saw the musical performed."

This Court, in March of 1975 reversed, holding at Page 4367:

> "We hold that respondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimum procedural safeguards."

The basis for this holding was the following reasoning (p. 4369):

> "Only if we were to conclude that live drama was unprotected by the First Amendment—or subject to a totally different standard than that applied to other forms of expression—could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems (citations omitted). By its nature, theatre usually is the acting out or singing out of the written word, and freqeuntly mixes speech with live action or conduct. But that is no reason to hold theatre subject to a drastically different standard."

By so reasoning and holding, this Court recognized that a theatrical performance is an inseparable entity, a union of words, action, music, emotion, or any combination of the foregoing. "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Promotions Ltd.* v. *Atlanta,* 334 F. Supp. 634, 639 (N.D. Ga. 1971).[15] This is equally true of each type of theatrical performance, every one of which is subject to the nudity ban of the Ordinance herein.

As Mr. Justice Blackmun noted in *Southeastern Promotions* v. *Conrad, supra,* each art form presents its own unique set of First and Fourteenth Amendment problems. Each must be judged for what it is, not by standards applicable to another medium of expression. There is no aspect of speech (with the possible exception of the written word)

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[15] It is not, therefore, "separately identifiable conduct which allegedly was intended by (petitioner) to be perceived by others as expressive of particular views but which on its face, does not necessarily convey any message." *Cohen* v. *California,* 403 U.S. 15, 18.

which does not involve an integrally related action that is part and parcel of that speech.[16] Thus in *Kleindienst* v. *Mandel,* 408 U.S. 753, 764, the speech-conduct argument was expressly rejected by this Court which stated:

> "We cannot realistically say that the problem facing us disappears entirely or is non-existent because the mode or regulation bears directly on physical movement."

The integrated activities protected by the First Amendment, too numerous to tabulate, including writing, publishing, dancing, singing, acting, picketing, leafleting, demonstrating, broadcasting, etc., are all speech, and are curtailable in whole or in part only by narrowly drawn restrictive legislation designed and necessary to vindicate compelling governmental interests. *U.S.* v. *O'Brien,* 391 U.S. 367, 376. Moreover, when such restrictive regulation involves sexual content, it must satisfy obscenity criteria. *Miller* v. *California,* 413 U.S. 15, 25-6.[17]

If, as this Court has recently held in *Southeastern Promotions Ltd.* v. *Conrad, supra,* theatrical performances including bare breasted females are just as much presumptively protected by the First Amendment as motion pictures and cannot therefore be subjected to prior restraints, can the content of such theatrical productions be restricted by an across the board prohibition against the baring of a breast? Is there any doubt that the Town of North Hempstead would have no power to forbid the exposure of a naked breast in a motion picture in any public place within

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[16] See *Tinker* v. *Des Moines School District,* 393 U.S. 503; *Organization For a Better Austin* v. *Keefe,* 402 U.S. 415, 419; *Spence* v. *Washington,* 417 U.S. ——; *Southeastern Promotions Ltd.* v. *Conrad, supra.*

[17] Obscenity is not in issue herein. Further, appellants do not allege that appellee's theatrical presentations are obscene.

the Township? How then can appellants argue that this is permissible in the case of theatrical productions? If the Town of North Hempstead cannot summarily deny a license for the exhibition of the show "Hair" in its municipal auditorium, how can it proscribe its exhibition in any public place in the Town.

Appellants formulate their speech conduct dichotomy as follows: "because topless dancing is conduct with little, if any, expressive elements," it is not afforded absolute First Amendment protection "and the Town may properly exclude this form of 'entertainment' " under its police power. (Appellants' Brief—Pages 16 and 17). Firstly, it cannot be overemphasized that the ordinance is directed at bare bosoms "in any scene, sketch, act or entertainment" (Section III of ordinance—App. p. 5). It is not limited to topless dancing. It is not limited to "conduct with little, if any, expressive element." (Appellants' Brief—Page 16). It covers any bare bosom in any theatrical performance, whether that theatrical performance be a dramatic presentation of the biblical story of Adam and Eve, the musicals "Hair" or "Calcutta", the musical revue of the Follies Bergere, or the Ballet Africans.

Secondly, as was noted heretofore and in *Southeastern Promotions Ltd.* v. *Conrad, supra,* a theatrical production, like a motion picture, is not conduct within the meaning of *Broadrick* and *O'Brien,* but protected expression.[18] In neither of the foregoing cases was there any theatrical production or artistic endeavor. Even in those cases however, it was clearly held that *only a compelling governmental*

[18] *Sheldon* v. *Metro-Goldwyn,* 81 F. 2d 49 (2d Cir.—Judge Learned Hand): "Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves . . . a nod, a movement of the hand, a pause may tell the audience more than words could tell . . . the play is the sequence of the confluents of all these means bound together in an inseparable unity . . ."

interest in regulating the nonspeech element can justify incidental limitations on the protected expression.

Thirdly, in *O'Brien* it was clearly held that the governmental interest to be protected must be unrelated to the suppression of free expression and the incidental restriction on the First Amendment freedom must be no greater than is essential to the furtherance of that interest. *U. S.* v. *O'Brien,* 391 U.S. 367, at 376-377 (1968). Thus even if this were a case of mixed conduct and speech (which it is not), this blunderbuss ordinance cannot be justified on any grounds other than speech inhibition, and if founded on the grounds set forth in appellants' papers, is far greater in sweep than essential to the furtherance of the legitimate governmental interest sought to be achieved thereby.

Fourthly, the ordinance regulates a speech element of a theatrical performance, rather than a non-speech element, since the nudity is an integral element of the artistic performance, the totality of which is inseparable protected speech (unless obscene).

At the end of Point III, appellants question the right of appellees to assert the overbreadth of the ordinance where it is abundantly clear that their activities could or would fall within the proscription of a more narrowly drawn law.[19] Appellants further contend that the ordinance is subject to a limiting construction or partial invalidation which may remove the applicability of the overbreadth rules. These positions are wholly untenable and fly in the face of all First Amendment precedents.

Initially, it should be noted that when local laws which limit First Amendment freedoms are challenged in a Federal Court on grounds of overbreadth, they must be judged on their face. *Aptheker* v. *Secretary of State,* 378 U.S. 500; *Zwickler* v. *Koota,* 389 U.S. 241. It is not the function

[19] This argument might be more aptly addressed to standing.

of the Federal Court to predict or foresee a limiting construction of the words of the ordinance. Secondly, the Federal Court cannot dissect the overbroad ordinance, invalidating some and saving the rest. As was said in *Smith* v. *California, supra,* at 151:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution."

Thirdly, the fact that appellees are aware that the ordinances are directed at them does not eliminate the constitutional deficiency of vagueness and overbreadth in the First Amendment sense. As was said in *NAACP* v. *Button,* 371 U.S. 415, at 432-433,

> "The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping and improper application."

Thus, a person may know that he is or may be caught within the net of an overbroad speech inhibiting statute and thereby be chilled in the exercise of his First Amendment rights.[20]

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[20] Appellants' contention that the chill results from lack of notice of the scope of regulation is wholly incorrect. The reference by appellants to *Younger* v. *Harris* is more properly covered under Point IV on the issue of abstention. At this time, however, it should be noted that *Younger* did not hold as appellants contend, that the plaintiffs' activity must be shown to be protected activity without any possibility of regulation by a narrowly drawn law.

Fourthly, appellees herein have every right to assert the overbreadth of the Ordinance herein even if it be conceded, which it is not, that their activities could be properly proscribed by a narrowly drawn ordinance. In *Tollett* v. *United States,* 485 F. 2d 1087 1088-9 (1973), the United States Court of Appeals for the Eighth Circuit treated these issues, reviewing the precedents of this Court in some detail. It concluded as follows:

> "It is now settled that a person has standing to attack a statute as overly broad if a reasonable construction of the act allows suppression of free speech notwithstanding that the person's own conduct might not be constitutionally protected. This rule is recognized because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping and improper application.' *Dombrowski* v. *Pfister,* 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1965), quoting *NAACP* v. *Button,* 371, U.S. 415, 433, 83 S. Ct. 328, 9L. Ed. 2d 405 (1963). Without proper restriction such a law 'would tend to suppress constitutionally protected rights.'' Note, the First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 873 (1970). To allow standing under such circumstances 'is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.' *Gooding* v. *Wilson,* 405 U.S. 518, 521, 92 S. Ct. 1103, 1105, 31 L. Ed. 2d 408 (1972). Since this is a departure from traditional rules of standing the doctrine requires that the overbreadth of a statute 'must not only be real, but substantial as well.' *Broadrick* v. *Oklahoma,* —— U.S. —— 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)."

Virtually all of the arguments of appellants at the end of Point III were disposed of by this Court in *Gooding* v. *Wilson,* 405 U.S. 518, at 520, 521 (1972), when this Court held:

> "Only the Georgia Courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe State legislation.' *United States* v. *37 Photographs,* 402 U.S. 363, 369, 28 L. Ed. 822, 830, 91 S. Ct. 1400 (1971). It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' *Dombrowski* v. *Pfister,* 380 U.S. 479, 491, 14 L. Ed. 2d 22, 31, 85 S. Ct. 1116 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,' (Citations omitted). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.
>
> • • •
>
> 'Although a statute may be neither vague, overbroad, or otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect is striken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights.' *Coates* v. *City of Cincinnati, supra,* at 619-620, 29 L. Ed. 2d 221 (opinion of White, J.' (Citation ommitted)."

It cannot be doubted that the ordinance is overbroad, is speech inhibiting, is directed against a class of which appellees are members, and is subject to attack on this basis by appellees as violative of their First and Fourteenth Amendment rights.

POINT IV

Abstention is inappropriate where as in the instant case appellees commenced this federal action at a time when no prosecution whatsoever was pending against them under the ordinance in the State Courts.

Abstention Is Not Appropriate And *Younger* Is Not Applicable

Appellants' Point IV urges upon this Court a novel doctrine of *post facto* jurisdictional divestiture and seeks as well the reconsideration and reconstruction by this Court of the line of cases commencing with *Dombrowski* v. *Pfister, supra,* and running through *Zwickler* v. *Koota,* 389 U.S. 241; *Younger* v. *Harris,* 401 U. S. 37 and *Steffel* v. *Thompson,* 415 U.S. 452 (1974).

It is well established and the Court below held, that where an action challenges local law as being violative of the First Amendment on its face, a Federal Court must decide the issues on the merits and not abstain. *Zwickler* v. *Koota, supra,* at 248-252 (1967); *Dombrowski* v. *Pfister, supra,* at 483-485 (1964); *Steffel* v. *Thompson, supra.* The rejection of abstention in such cases results from the

paramount importance of removing the inevitable chilling effect on First Amendment rights that such a statute invariably establishes. As this Court has frequently stated, relegating a plaintiff to a State Court to vindicate First Amendment rights after a Federal action has been commenced would not only be unwise but would constitute an abrogation by Federal Courts of their prime responsibility to uphold constitutional liberties. Thus in *Zwickler* at Page 252, the Court held:

> ". . . Congress imposed the duty upon all levels of the Federal Judiciary to give due respect to a suitor's choice of a Federal forum for the hearing and decision of its Federal constitutional claims. Plainly, escape from that duty is not permissible merely because State Courts also have the solemn responsibility, equally with the Federal Courts ' . . . to guard, enforce and protect every right granted or secured by the Constitution of the United States . . .' *Robb* v. *Connoly,* 111 U.S. 624. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."
> "These principles have particular significance when, as in this case, the attack upon the statute upon its face is for repugnancy to the First Amendment. In such a case to force the plaintiff who has commenced a Federal action to suffer the delay of State Court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

While it is true that the *Younger* Sextet did, as appellants claim, examine the propriety of anticipatory federal relief against state criminal proceedings, it has never been suggested that those cases required or even suggested that Federal Courts abstain from adjudicating First Amendment challenges against overbroad laws except where the Federal plaintiff was at the time of the filing of the federal complaint a subject of State Court enforcement of the law which was being attacked in the Federal complaint. Thus, in *Younger* v. *Harris, supra,* at Page 41, the Court held:

> "We express no view about the circumstances under which Federal Courts may act when there is no prosecution pending in State Courts at the time the federal proceeding is *begun.*" (emphasis supplied)[21]

In *Steffel* v. *Thompson, supra,* this Court clearly held at page 475 that:

> "Regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal *plaintiff demonstrates a genuine threat of enforcement* of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." (emphasis supplied)

In view of the foregoing, it would appear that appellants are confusing abstention doctrines with the very particular and special situations presented by the *Younger* sextet involving factual situations where State Court proceedings had been commenced prior to the invocation of Federal court jurisdiction.

It would be difficult to improve upon the decision of the Circuit Court below on these issues.

---

[21] In his dissent below, Judge Lumbard misconstrues *Younger* v. *Harris* as requiring abstention in the absence of "special circumstances" when there "is only a threat of state prosecution." App. p. 10a). This construction would deny a federal forum to those chilled by an overbroad law unless they were harassed or subjected to bad faith law enforcement. This is so since Federal standing in civil rights cases requires the threat of enforcement and enforcement requires abstention.

On the subject of state-federal comity, it should be noted that appellants were aware of the filing of the federal complaint and the imminent federal adjudication of the constitutional issue with respect to the Ordinance. If they were so concerned with federal-state friction as they appear to indicate in their brief, they could well have refrained from commencing the criminal prosecution for a few weeks pending the determination of the Federal Court. It was the activities of appellants which precipitated federal-state abrasion, if any, which may have been occasioned in the instant case. Appellants seek to have this Court relegate appellees to a waiting period of years for the adjudication of the constitutional issue while the state case wends its way through the multi-tiered state criminal process, yet, appellants could not wait the few weeks that the Federal Court would take in adjudicating the issue.[22] It is not the Federal Court's assumption of its rightful duties and jurisdiction, but rather appellants' failure to stay their own hands, that precipitated whatever friction that was created in the instant case. It could have readily been avoided by the mere recognition by appellants of the substantial constitutional question raised by the federal complaint and a little patience which would allow the one appellee who resumed the proscribed activity to continue doing so for a few weeks more without prosecution. Can appellants explain what damage would have been done had they allowed an activity which had been carried on in the Town for many prior years to continue for a few weeks more?

While *Younger* is *not* applicable, since the federal action preceded any state court process, the following should also be noted. *Younger* was not decided for the purpose of enabling a local government to initiate a series of multiple

[22] In the words of Mr. Justice Brennan, appellants argument herein is indeed intended to "turn Federalism on its head." *Steffel* v. *Thompson, supra,* at 472.

harassing prosecutions which would drive a person out of business prior to the date of the adjudication of the constitutionality of the law under which such prosecutions were commenced. It is submitted that had the multiple harassing prosecutions (8 prosecutions in a period of a few days) been initiated prior to the date of the commencement of the federal action, this would have constituted the "special circumstances" of *Younger,* militating against abstention. These eight criminal prosecutions commenced in machine gun fashion against employees of the one appellee who felt compelled to resume the proscribed activity after the commencement of the federal action, did not expose that appellee to an injury "incidental to every criminal proceeding brought lawfully and in good faith." *Younger* v. *Harris, supra,* at 49.[23]

It is not comity that appellants seek to sustain in this case, but rather the right of this municipality to drive appellees out of business prior to the vindication of their First and Fourteenth Amendment rights. This case manifests nothing but blatant disregard for the First Amendment.[24]

On the issue which appellants refer to as the "Alphonse-Gaston routine," it must be clear to all that this is a misnomer. There has been no reluctance on the part of the local government to assume and even usurp jurisdiction. In any event, while it may not be particularly appealing to have the Court which determines constitutional rights selected by so arbitrary a means as "first come-first

[23] In *Younger* at 49, the Court held,
"There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected."

[24] The subsequent enactment of a second ordinance comparable to the Ordinance herein and the attempt to enforce said ordinance in the face of the decisions in this case prior to the adjudication by this Court is further evidence of that disregard for the First Amendment.

served", in a constitutional federal system, wherein both systems of Courts are charged with the protection of the same constitutional rights, is there a more desirable alternative? At least with such a rule, the locus of decision making power is readily determinable. Appellants have suggested no better formula unless its proposed doctrine of *post facto* jurisdictional divestiture is accepted by this Court, in which case the Federal Courts will have essentially abrogated their responsibility of adjudicating constitutional rights threatened by overbroad speech inhibiting local laws.

Abstention would serve no purpose in this case. Only where a limiting validating construction could be placed upon the statute by the State Courts in a single case would there be *any* valid rationale for abstention. *Dombrowski* v. *Pfister, supra,* 491, *Gooding* v. *Wilson, supra,* 520-1.[25]

The Ordinance must be uncertain in nature, and "obviously susceptible of a limiting construction" in order to warrant abstention. *Zwickler* v. *Koota, supra,* at 251, note 14.

The overbreadth of the instant statute is such that it would take innumerable cases and a like number of years to limit the statute to a point where the substantive issue of constitutionality would pose a credible problem. In fact, far from being *obviously susceptible of a limiting construction,* it is unlikely that any construction could save this overbroad speech inhibiting statute. The only purpose for abstention in the instant case would be to permit the state

[25] Judge Oakes responded to the limiting construction issue as follows in footnote 6 of the opinion below (App. p. 10a): "In other words, we are asked to abstain on the sheer speculation that state Courts might interpret Local Law No. 1—1973 contrary to its explicit language, thereby removing the constitutional question. Such speculation does not satisfy the 'special circumstances' required to make abstention proper. See: *Zwickler* v. *Koota,* 389 U.S. 241, 249-52, 254 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 375-78 (1964)."

to put appellants out of business through the suppression of their First and Fourteenth Amendment rights prior to the expiration of the many years that it would take to adjudicate the issues raised herein through the multi-tiered state criminal process.[26] This is not what *Younger* meant to accomplish.

Abstention is neither required nor appropriate and federal anticipatory relief was plainly warranted.

There Was Irreparable Injury In The Traditional Equity Sense

Since *Younger* is not applicable, and since appellees demonstrated traditional equity irreparable injury, appellees were entitled to injunctive relief.

As to the irreparable injury which would warrant injunctive relief, the Courts below found no problem, after hearings, in determining that appellees were faced with virtual insolvency as a result of their compliance with the ordinance. The affidavits on the motion for a preliminary injunction clearly indicate that appellees' customers, accustomed to the entertainment proscribed by the ordinance, merely shifted their business from appellees' premises, leaving appellees with daily losses in operations. This was confirmed in hearings conducted by the Court. It is not even controverted by appellants. What greater irreparable injury can there be to the exercisors of First Amendment rights than to drive them out of business by means of legislation censoring and suppressing such rights?

[26] It cannot be doubted that "where First Amendment rights are involved—questions relating to the structure and timing of (judicial) remedies have been thought crucial to substantive constitutional policies." Hart & Wechsler, *The Federal Court and* the Federal System, (2ed.) 367; See also Monaghan, *First Amendment, "Due Process"*, 83 Harv. L. Rev. 518, 524-26. It is upon this basis that anticipatory relief in cases involving potentially speech inhibiting laws is founded.

Judge Oakes, in his majority opinion below, summarized the finding of irreparable injury succinctly, as follows:

> "In short, if the ordinance here with its $500 per day fine were enforced against these appellees, they would be required to continue in business without presenting their form of entertainment (thereby involving a potential deprivation of their and the public's first amendment rights).
>
> In that case, they allege, they would also sustain a 'substantial loss of business and threatened bankruptcy.' Their option—violating the law to exercise their claimed rights and awaiting prosecution in the New York courts—involves its own loss of economic and personal rights. Here as in *414 Theater Corp.* v. *Murphy, supra,* there is sufficient irreparable injury indicated to justify at least the temporary injunction. We are left then with the question of the applicability of the *Younger* sextet to the preliminary injunction sought here. With respect to appellees Tim-Rob Bar and Salem Inn the *Younger* question is in exactly the same posture as encountered by this court in the recent decision, *414 Theater Corp.* v. *Murphy, supra.* In *414 Theater* we affirmed the preliminary injunction, in short because the underlying rationale behind *Younger* did not apply when state prosecutions were not pending when the Federal actions were brought. Id. at 3573-76. See *Steffel* v. *Thompson,* 42 U.S.L.W. 4357, 4360 (U.S. Mar. 20, 1974); *Lake Carriers' Association* v. *MacMullan,* 406 U.S. 498, 509 (1972). Similarly, we find *Younger* inapplicable to Tim-Rob Bar and Salem Inn here, and accordingly affirm the preliminary injunction as to them"

It cannot be overemphasized that where First Amendment rights are involved the irreparable injury stems not

only from the economic loss resulting from the enforcement of the ordinance, but also from the violation of the First Amendment rights both of the exhibitors and their patrons. See: *Procunier* v. *Martinez,* 416 U.S. ——, 42 U.S.L.W. 4606, 4610 (U.S. Apr. 29, 1974).

Even Assuming *Younger* Applicable, This Case Comes Within The Exceptions (Special Circumstances)

Even had the multiple harassing prosecutions (8 prosecutions in a period of a few days) been initiated prior to the date of the commencement of the federal action, *Younger* would not have required abstention. These eight criminal prosecutions commenced in machine gun fashion against employees of the one appellee who felt compelled to resume the proscribed activity after the commencement of the federal action, did not expose that appellee to an injury "incidental to every criminal proceeding brought lawfully and in good faith." *Younger* v. *Harris, supra,* at 49. In *Younger* at 49, the Court held,

> "There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected."

Thus it is clear that *Younger* was not a license to suppress First Amendment activity under an unconstitutional ordinance through a series of repetitive harassing criminal prosecutions aimed at suppressing the expressive activity carried on at the premises. Under the Younger circumstances, that of the pendency of a single state criminal prosecution prior to the invocation of federal jurisdiction, abstention was appropriate. Where, however, as in the instant case, there was no single prosecution, but rather eight prosecutions commenced within a period of days, it cannot be said that *Younger* requires or even warrants abstention. It is not possible to vindicate First Amendment

rights even in the State Courts where there is rapid fire repeated multiple prosecutions. When that factor is considered along with the fact that there is no limiting construction even if *Younger* were applicable (which it is not) this case comes within the exceptions.

The final issue raised herein is whether assuming abstention is inappropriate with regard to the two appellees who were never involved in state proceedings,[27] should appellee M & L be treated differently. The clear advantages of conservation of judicial energy, speedy determination and avoidance of conflicting substantive determinations favors equal treatment for M & L. Are there any significant interests militating against such equal treatment? Would the desire to avoid the alleged state-federal abrasion underlying the doctrine of comity be served by abstaining with respect to one federal plaintiff and not as to the other two? The answer is obvious. Since significant interests call for equal treatment of all three appellees herein and no interests militate against such equal treament, abstention as to M & L is uncalled for in this case.[28]

Thus, abstention is inappropriate herein with regard to any of appellees as to both declaratory and injunctive relief.

---

[27] The dissent below (App. pp. 13a, 14a) would require the two appellees not involved in any state prosecution to await the adjudication of their claim herein by the State Courts in the M & L employees' prosecutions. This would place the two appellees in a position of never having an opportunity to be heard. It must be assumed that the dissent below would come to the same conclution had the state commenced a criminal prosecution under the Ordinance against a non party to the instant action at any time prior to federal adjudication.

[28] This is so even if it might be warranted under some theory of *post facto* jurisdictional divestiture, were M & L the only appellee.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

HERBERT S. KASSNER
Attorney for Appellees
122 East 42nd Street
New York, New York 10017

With him on the Brief:

SEYMOUR S. DETSKY
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RALPH J. SCHWARTZ, JR.
22 East 40th Street
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MOTION FILED

APR 11 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—337

FRANK DORAN, Individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A LATE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE TOWN OF SMITHTOWN, IN SUPPORT OF THE APPELLANT, FOR REVERSAL OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOWARD E. PACHMAN
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—337

FRANK DORAN, individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

MOTION FOR LEAVE TO FILE A LATE BRIEF *AMICUS CURIAE*

This is a motion by the Town of Smithtown, a municipality located in the County of Suffolk, Long Island, State of New York. It is located approximately thirty (30) miles east of the Town of North Hempstead.

The Town of Smithtown has an ordinance[1] (attached hereto as Appendix I) substantially similar to the ordinance which is the subject of the direct appeal.

During the same timeframe, as set forth in the facts of the direct appeal, the Town of Smithtown has been endeavoring to enforce its Local Law #1—1973, but has been stymied by parallel litigation in the state and federal courts.

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[1] Chapter 15—Entertainment Regulations, Code of the Town of Smithtown, Suffolk County, New York.

Motion for Leave to File a Late Brief
Amicus Curiae.

Local enforcement of the ordinance by state criminal proceedings was enjoined on May 21, 1974, by the United States District Court, Eastern District, per Bruchhausen, J., pursuant to 42 U.S.C.A. 1983, on the grounds that Local Law #1—1973 placed the proponents, the manager, James Francione, and the owner, Gajon Bar & Grill, Inc., in danger of irreparable harm because the law, by its broad terms, was discriminatory on the basis of sex and had a chilling effect on the free exercise of their First Amendment rights and the public's right to view and be entertained by topless dancers.

The injunction was appealed to the U. S. Court of Appeals, Second Circuit, 508 F.2d 1317 (1974), which reversed on the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971), stating:

> "Although a United States District Court has granted a preliminary injunction in *Salem Inn, Inc.* v. *Frank,* 364 F.Supp. 478 (E.D. N.Y. 1973) aff'd 501 F.2d 18 (2 Cir. 1974) on the ground that a similar ordinance was probably constitutionally invalid, New York State courts twice have upheld the constitutionality of similar local laws. *People* v. *Moreira,* 70 Misc.2d 68, 333 N.Y.S. 2d 215 (1972); *Brandon Shores, Inc.* v. *Village of Greenwood Lake,* 325 N.Y.S.2d 957 (1971)."

The local state criminal proceedings have been reactivated and are presently pending, a motion to dismiss having been made in the local state criminal court on the grounds of unconstitutionality.

This motion is made to join, support and advocate the arguments set forth in the brief of appellants in the pending appeal because the Town of Smithtown, as some 23

Motion for Leave to File a Late Brief
Amicus Curiae.

other New York State towns,[2] has adopted similar ordinances and this case has a statewide concern and interest; hence, the arguments of *amicus curiae* should be appropriately presented and received by this Court.

Counsel for appellants has consented to the appeal, but appellees have refused (see Exhibits A, B and C); for this reason, the brief is being filed late. It would further appear that possible consent is not necessary pursuant to Rule 42(4) of the Supreme Court Rules.[3] The Town of Smithtown is a political subdivision of the State of New York, it being a municipal corporation.[4]

WHEREFORE, movant prays that the attached brief *amicus curiae* be permitted to be filed by the Court.

Respectfully submitted,

HOWARD E. PACHMAN
Special Counsel to the
Town of Smithtown
Attorney for Amicus Curiae
6143 Jericho Turnpike
Commack, New York 11725
(516) 864-5900

---

[2] A non-exhaustive survey of the Towns of New York State, exclusive of cities and villages, reveals the following towns have adopted the same or similar "anti-topless local law or ordinances" evidencing a substantial statewide policy and/or concern: Towns of Babylon, Bedford, Brandon, Colonie, Cheetowaga, Callicoon, Eastchester, Forestberg, Gates, Hempstead, Henrietta, Limberland, Moreau, North Hempstead, Ossining, Oyster Bay, Rotterdam, Southampton, Tusten, Warwick, Webb.

[3] "Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented . . . for a political subdivision of a state . . ."

[4] McKinney's Cons. Laws of N.Y., Book 61, Town Law, Section 2.

Exhibit A-1

, P.C.

February 7, 1975

Joseph H. Darago, Esq.
220 Plandome Road
Manhasset, N.Y. 11030

Re: Gajon Bar & Grill, et al.
v. Eugene Kelley, et al.
(Salem Inn, Inc., et ai.
v. Town of North Hempstead,
et al.)

Dear Joe:

We enclose herewith stipulation pursuant to Rule 42 of the Supreme Court Rules. We would appreciate your signing the original and copy thereof and forwarding same to Kassner & Detsky, Esqs., and requesting that they sign the original and copy and return same directly to this office. An additional copy of the stipulation is enclosed herewith for your records, together with an additional copy thereof for Kassner & Detsky, Esqs.

Thank you for your cooperation.

Very truly yours,

HOWARD E. PACHMAN

hep/drh
Enclosures
cc: Hon. Paul J. Fitzpatrick,
Supervisor, Town of Smithtown
Charles F. Cacciabaudo, Esq.
Town Attorney, Town of Smithtown
} with encl

Exhibit A-2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

SALEM INN, INC., M & L REST., INC., and
TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

WE HEREBY CONSENT, pursuant to Rule 42 of the Supreme Court Rules, that the attached *amicus curiae* brief may be filed in this proceeding with the Supreme Court of the United States.

Dated: February , 1975.

JOSEPH H. DARAGO
Attorney for Appellant Francis F. Doran, individually and as Town Attorney of the Town of North Hempstead

KASSNER & DETSKY
Attorneys for Plaintiffs-Appellees

Exhibit B

, P.C.

February 24, 1975

Joseph H. Darago, Esq.
220 Plandome Road
Manhasset, N.Y. 11030

Re: Gajon Bar & Grill, et al.
v. Eugene Kelley, et al.
(Salem Inn, Inc., et al.
v. Town of North Hempstead,
et al.)

Dear Joe:

A review of our file indicates that on February 7, 1975, we forwarded to you a stipulation pursuant to Rule 42 of the Supreme Court Rules permitting the Town of Smithtown to appear *amicus curiae* in the Salem Inn action. As of this writing, we have not received the stipulation executed by your office or by Kassner & Detsky, Esqs. Kindly advise us as to the reason for the delay.

We await your early response.

Very truly yours,

hep/drh

Howard E. Pachman

Exhibit C

, P.C.

March 3, 1975

Kassner & Detsky, Esqs.
122 East 42nd Street
New York, N.Y. 10017

Att: Herbert S. Kassner, Esq.

Re: Salem Inn, Inc., et al. v. Town of
North Hempstead, et al.
(Gajon Bar & Grill, et al. v. Eugene
Kelley, Town of Smithtown, et al.)

Dear Mr. Kassner:

On February 7, 1975, we forwarded to Joseph H. Darago, Esq., stipulations, pursuant to Rule 42 of the Supreme Court Rules, to appear as amicus curiae in the above matter.

Mr. Mineo of Mr. Darago's office advised us that the stipulations had been signed by them and forwarded to your office for execution. My secretary contacted your office and was unable to speak with you but spoke with your partner, Mr. Detsky, who indicated that he was, apparently, reluctant to sign the stipulations and suggested we make a motion to intervene. This procedure would appear to be cumbersome and require additional work, all of which is unnecessary and can be obviated by the signing of the stipulation.

The issues are significant and affect towns throughout the State of New York. As Special Counsel to the Town of Smithtown, we are desirous of having a definitive decision from the Supreme Court and would like to add our brief

in support of the municipality's position. Your failure to consent does not do justice to the issues but would appear to pursue a partisan approach.

We trust you will re-evaluate your position and promptly execute and return the stipulations previously forwarded to you.

Thank you for your anticipated cooperation.

Very truly yours,

Howard E. Pachman

hep/drh
cc: Joseph H. Darago, Esq.

Appendix I

Chapter 15

ENTERTAINMENT REGULATIONS

Local Law
No. 1
1973

A LOCAL LAW TO REGULATE ENTERTAINMENT IN PUBLIC PLACES

§ 15-1. Clothing requirements.

§ 15-2. Definitions.

§ 15-3. Violations and penalties.

§ 15-4. When effective.

§ 15-5. Repealer.

[HISTORY: Adopted Smithtown Town Board 1-23-73 as Local Law No. 1, 1973.[1] Amendments noted where applicable.]

Be it enacted by the Town Board of the Town of Smithtown as follows:

§ 15-1. Clothing requirements.

It shall be unlawful for any female to appear in public clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a

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[1] Editor's Note: This local law supersedes former Ch. 15, Entertainment Regulations, adopted 8-4-70 as L.L. No. 2, 1970.

fully opaque covering. Any person shall be guilty of violating this section who, in any capacity, knowingly directs, gives, manages, participates in, prepares or presents, or who employs others so to do any live public show in which a female appears clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering.

§ 15-2. Definitions.

For the purpose of this local law, the terms used herein are defined as follows:

In Public—Any place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place accessible to the public to gather or pass to and from.

Live Public Show—A public show in which human actors, dancers or other performers, employees or other persons appear in person before spectators or customers. A bona fide drawing, painting, photography, sculpture or other art class utilizing human models and admitting only participating instructors, students and models shall not be deemed a "live public show."

Public Show—Any entertainment or exhibition advertised or in other fashion held out to be accessible to the public, whether or not an admission or other charge is levied or collected; an entertainment or exhibition shall be deemed a "public show" although access to it is only granted to members of a club or other association when membership in such organization is obtained upon payment of an admission price or contribution or token dues or other small fee, and the organization in fact exists primarily for sponsoring or arranging admissions to such performances.

§ 15-3. Violations and penalties.

Any person found guilty of violating this local law shall be subject to imprisonment not to exceed fifteen (15) days, or a fine to be fixed by the court not to exceed two hundred fifty dollars ($250.), or both.

§ 15-4. When effective.

This local law shall take effect ten (10) days after adoption.

§ 15-5. Repealer.

This local law supersedes and replaces Local Law No. 2 of 1970.

Supreme Court of the United States

IN THE

OCTOBER TERM, 1974

No. 74—337

FRANK DORAN, individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

BRIEF *AMICUS CURIAE* OF THE TOWN OF SMITHTOWN, IN SUPPORT OF THE APPELLANT, FOR REVERSAL OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

This case presents a fundamental challenge to the rights of a municipality to enact local laws in the area of health, safety and morals, pursuant to the authority vested in it by the Constitution of the State of New York and the various laws enacted by the New York State Legislature, more particularly Chapter 40 of the Laws of the State of New York, for the year 1970, which amended Sections 245.01, 245.02 of the N. Y. Penal Law.*

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* McKinney's Consolidated Laws of N.Y., Book 39, Penal Law Sections 245.01, 245.02.

Statement

The instant case arises from an appeal of a judgment of the United States Court of Appeals for the Second Circuit, which was entered the 25th day of June, 1974, entitled *Salem Inn, Inc.* v. *Frank,* 501 F.2d 478 (1974), which affirmed an injunction issued by the U.S. District Court, Eastern District, per Bartels, J., dated the 26th day of September, 1974, 364 F. Supp. 478 (1973), which declared the Town of North Hempstead's Local Law No. 1 of 1973 unconstitutional.

The appellants are Louis J. Frank, Police Commissioner for Nassau County, Frank Doran, Town Attorney for the Town of North Hempstead, and Howard Ernhorn, Chief of Police for the Village of Port Washington, who were charged with the enforcement of Local Law No 1 of 1973, a law prescribing the regulation of cabarets, bars, lounges, dance halls, discotheques and other public places in general, in essence an "anti-topless ordinance" (J.S.-4).**

The appellees are the owner and operator of bars which provide entertainment by permitting and exhibiting topless dancers.

The brief is written in support of the appellants' position that Local Law No. 1 of 1973 is constitutional.

Question Presented

1. This Court is called upon to affirm the right of a municipality to enact and enforce legislation in the area of health, safety and morals, i.e., to prohibit entertainment commonly called "topless dancing", more particularly where such legislative mandates have been affirmed by the state's highest court.

** J.S.—refers to pages of Jurisdictional Statement.

(A)

The Town of North Hempstead's Local Law No. 1 of 1973 derives its sanction from the statewide application and authority of Penal Law 245.01. This particular section of the Penal Law was scrutinized by the New York State Court of Appeals and was sustained. *People* v. *Price,* 33 N.Y.2d 831, 351 N.Y.S.2d 973 (1973), which reversed an affirmance of an order of the Appellate Term, First Department, entered December 11, 1972, one justice dissenting, a judgment of the Criminal Court, New York County, rendered August 11, 1971, convicting the appellant, Ch[illegible] Lee Price, after trial, of exposure of a female (Penal Law 245.01). The operative facts may be gleaned from the dissenting opinion of Mr. Justice Markowitz:

> "The complaint alleged that the complaining officer saw defendant walking on Aug. 5, 1971, at 5:30 P.M. at 2nd Avenue and East 12th Street, Manhattan, 'wearing a dress in such a manner that the entire areola and nipple were exposed.' His partner testified that on the date and time referred to defendant was wearing a 'fishnet type pullover (a mesh pullover) with wide openings which made the breasts fully visible to the public.' The diamond-shaped openings were about ½ an inch. Being a pullover type, there were no buttons or zippers. The officers were in a squad car at the time. There was no crowd before the arrest."

The Court of Appeals reversed the affirmance in the following opinion:

> "The order of the Appellate Term should be reversed, and the information dismissed. Statutes punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed. Section 245.01 of the Penal Law was aimed at discouraging 'topless' waitresses and their promoters. It should not be applied to the

noncommercial, perhaps accidental, and certainly not lewd, exposure alleged. Certainly, legislation may not control the manner of dress, absent commercial exploitation of exposure, or absent conduct or dress under circumstances creating or likely to create public disorder." (Citations omitted.)

Thereafter, the Appellate Term, Second Department, in *People* v. *Hardy* (N.Y. Law Journal, June 5, 1974, p. 19, col. 1), one justice dissenting, concluded:

"Judgment of conviction reversed on the law and facts, complaint dismissed and fine remitted.

"Defendant was charged with violating Penal Law Section 245.00 in that she was sun-bathing in the nude on a public beach along with several other persons. Under the law nudity in itself is not prohibited and lewdness cannot be presumed from the mere fact of nudity. There must be a showing of lewd conduct from which the intention to act in a lewd manner can be drawn. Since no evidence was introduced establishing that defendant had intentionally exposed her private parts in a 'lewd manner' or otherwise committed a 'lewd act', her guilt was not established beyond a reasonable doubt." (Citations omitted.)

Two Appellate Courts of New York have narrowly defined Penal Law Section 245.01. This has no less been the case when the local criminal courts were called upon to rule on the anti-topless ordinances. *People* v. *Moreira,* 70 Misc.2d 68, 333 N.Y.S.2d 215 (1972). A similar local ordinance to the one at bar was determined to be constitutional in *Brandon Shores, Inc.* v. *Inc. Village of Greenwood Lake,* 68 Misc.2d 343, 325 N.Y.S.2d 957 (1971).

The New York courts had used basic concepts of construction which limit, clarify and interpret statutes and/or ordinances so as to avoid the necessity of reaching the

constitutional question; the narrow definition put on the statute is that "the commercial exploitation of exposure" (*People* v. *Price,* 33 N.Y.2d 831, 351 N.Y.S.2d 973 (1973)) and the "bald attempt to profit on indecent exposure and drink" (*J.D.H. Rest. Inc.* v. *N.Y. State Liquor Authority,* 21 N.Y.2d 846, 288 N.Y.S.2d 1003 (1968), which affirmed without opinion 28 A.D.2d 521, 279 N.Y.S.2d 975) constitute conduct properly proscribed and thereby prohibited by a state penal statute; ergo, Local Law No. 1 of 1973 is not protected by the United States Constitution, First Amendment; the New York State Constitution, Article 1, Section B. These decisions are in consonance with the principles set forth in *United States* v. *O'Brien,* 391 U.S. 367 (1968), 376:

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

This was reasserted by the Court in *California* v. *LaRue,* 409 U.S. 109 (1972), 117:

"But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action'."

Since Local Law No. 1 of 1973 is directed at prohibiting a particular form of conduct, rather than "pure speech"

and, further, since the Local Law is quasi-criminal in nature, the appellees' attack on the law as being unconstitutional for facial overbreadth must meet the following standard:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973).

(B)

The New York State courts are not singular in their prohibition of topless dancing in bars. If we cross the Hudson River to the State of New Jersey, Pennsauken, Camden County, we find that New Jersey Lewdness and Obscenity statutes are being employed by the Camden County Courts and the Trenton District Court to restrict topless dancing. Although the problems are similar, the courts are reaching a different conclusion on the nuances of *California* v. *LaRue,* 409 U.S. 109 (1972), from that reached by the Court in *Salem Inn, Inc.* v. *Frank,* 501 F.2d 478 (2d Cir., 1974).

The initial litigation is reported in *Cherbonnie* v. *Kugler,* 359 F. Supp. 256 (D.C. N.J. 1973), and the facts and allegations have a strikingly similar cast:

> Plaintiffs are waitresses and employees of the Club Lido, its corporate owner, stockholder, manager, entertainers and a patron. The defendants are the State Attorney General, the County Prosecutor, the State A.B.C. Board and other law enforcement officials.
>
> Plaintiffs contend that the statutes and regulations under attack facially violate the First and Fourteenth Amendments to the federal Constitution in that the proscriptions therein infringe on their freedom of expression and, alternatively, are void for vagueness,

> with respect to the activity of topless dancing conducted for the entertainment of patrons of Club Lido.
>
> Defendant claimed that the statutes were facially constitutional and the court should refrain under the constraints of the abstention doctrine.

The Court considered the application of *California* v. *LaRue,* 409 U.S. 109 (1972), and abstained and made the following additional finding:

> "Moreover, inasmuch as a constitutional interpretation of the Lewdness Statute may be possible, and since there are presently pending in the State Superior Court a number of criminal cases in which the statutes herein involved are being challenged on a constitutional basis, the state courts should be afforded the initial opportunity to so interpret them. Consequently, we abstain." (at p. 260)

At this juncture, the matter came to a temporary halt. On February 8, 1974, the District Court in Trenton rendered a decision under the caption *Starshock, Inc.* v. *Shusted,* —— F. Supp. —— (D.C. N.J. Index #1805/73, February 8, 1974), which once again brings the Club Lido into court with many of the same parties and others in their representative capacities, but without the Alcoholic Beverage and Control Board, as a party defendant, since the liquor license was suspended.

The Club Lido had reopened under the banner: "Nude Interpretive Dancing—No Alcoholic Beverages Sold."

An action for declaratory judgment was commenced to enjoin the municipality from interfering with the Club's introduction of this form of entertainment into the local community.

The Court framed the following issue:

> "Is 'nude interpretive dancing' embraced within the guarantee of freedom of speech under the First Amendment to the United States Constitution?"

The Court reviewed the current trend of the law in this area and concluded:

> "The Supreme Court has taken a similar position with regard to the power of the state to limit gross sexual conduct devoid of any, or very minimal, elements of expression. *Miller* v. *California, supra* [413 U.S. 15 (1973)], at 26 n. 8; *California* v. *LaRue,* 409 U.S. 109, 117 (1972).
>
> "It is determined that the performances offered at the Club Lido fall far short of presenting an issue of 'speech' sufficiently important to outweigh the State of New Jersey's interest in curtailing nudity in public places . . . Although advertised as 'Nude Interpretive Dancing,' it was neither interpretive or dancing—just nude, a 'Go-go' performance bereft of outer dress. What we have here is a cheap exploitation of human sexuality for purely commercial purposes.
>
> • • •
>
> "Plaintiffs' motion for a Preliminary Injunction will be and hereby is denied."

On appeal, the Third Circuit Court of Appeals remanded the matter to the District Court for further proceeding because plaintiff was not given an adequate opportunity to present its cause to the District Court. The appeal was only decided on procedure grounds. *Starshock, Inc.* v. *Shusted,* —— F.2d —— (Index #74-1165, 3rd Cir., April 30, 1974).

The case was then reheard by the District Court and on July 29, 1974, after a hearing, the Court rendered its decision. *Starshock, Inc.* v. *Shusted,* —— F. Supp. —— (D.C. N.J., Trenton, Index #1806/73, July 29, 1974):

> "I found nothing in the testimony or in my view of the performance which would differentiate my view from that of the Chief Judge earlier. The State certainly has the power to limit, control the type of activity under consideration. *Miller* v. *California,* 413 U.S. 15 (1973).
>
> "I agree with the views expressed by the Chief Judge and only emphasize that we are dealing in the area of conduct rather than speech."

(C)

This case must be assayed and tested under the rules set forth in a case of similar import which was decided by the Supreme Court of California, *Crownover* v. *Musick,* 107 Cal. Rept. 681, 509 P.2d 497 (1973), which was an action to restrain, on constitutional grounds, enforcement of two county ordinances and city ordinance . . . challenging validity of ordinances . . . to prohibit further proceedings in certain criminal prosecutions for violation of ordinances . . . which . . . prohibited nudeness on part of performers . . . in places where liquor and food were sold and which provided an exemption for theaters, denied neither freedom of speech and expression nor equal protection and were in all respects valid and constitutional regulations of conduct.

The issue there, as here, may be stated as follows:

> "Is topless dancing 'speech' or conduct which is in essence 'speech' or 'closely akin to speech'?"

The California Supreme Court held:

> "They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she must have some clothes on. In a word the ordinances regulate conduct. (509 P.2d 497, p. 510)
>
> • • •
>
> "Unless we wish to blind ourselves to what is happening in big cities with their 'topless' and 'bottomless' bars and 'nude live acts' in a tawdry atmosphere

that blights the neighborhood if not the entire community, it is common knowledge that such conduct is nothing more than a sales gimmick. It is delusive to speculate in the face of these realities that the entertainment in this milieu will acquire protectible communicative properties by exposure of the genitals, pubic area or female breasts of the performers. Assuming arguendo that there may ensue in instances an expression which is communicative in the constitutional sense, we do not think it is unreasonable to regulate the *form* or *manner* of the communication. (p. 510)

* * *

"We, therefore, conclude that the ordinances on their face do not infringe upon the rights of freedom of speech or expression but are valid regulations of conduct. In light of this conclusion we reject plaintiffs' contention that the ordinances are unconstitutionally broad. (p. 512)

* * *

"We, therefore, inquire whether the distinction inherent in the 'theater exemption' bears some rational relationship to a conceivable governmental purpose. We are of the opinion that it does. We judicially notice (a) as a matter of generalized knowledge that theater entertainers usually perform on a stage removed from the audience, while waiters and waitresses must by virtue of their calling mingle constantly with the patrons. Similarly, if entertainers perform on a stage in a bar, that stage is likely to be much smaller and closer to the patrons than is a stage located in a theater. As noted *supra* in our discussion of the police power, there are conceivable and legitimate state purposes involved in regulating the exposure of the public area, genitals or breasts by waiters, waitresses and entertainers. Such purposes conceivably include the furtherance of the public order, morals and welfare. But the same considerations are arguably not involved in a theater where nude persons are generally separated from the customers by a stage of large dimensions. Situations provide a rational basis to treat differently nude performers in theaters, on the one hand, and nude performers, waiters and waitresses in establishments such as plaintiffs' on the other." (Citations omitted.) (p. 514)

(D)

Although the District Court had jurisdiction to entertain the motion and the original litigation, there remains the question whether consistently with the principles governing equitable relief the Court should have exercised its remedial powers.

This concept is most applicable when the state courts have decided the matter and/or there is a state criminal proceeding pending. In two most recent decisions of this Court, the aforestated principle has been reaffirmed:

". . . We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts." *Huffman* v. *Pursue, Ltd.*, —— U.S. —— (No. 73-296, March 18, 1975), 43 L.W. 4379.

"As to state criminal prosecutions, such justification has been found to reside in the peculiarly compelling demands of federalism and the 'special delicacy of the adjustment to be preserved between federal

> equitable power and State administration of its own law . . .' The precise content of constitutional rights almost invariably turns on the context of fact and law in which they arise. State courts are quite as capable as federal courts of determining the facts, and they alone can define and interpret state law. Equally important, under Art. VI of the Constitution, state courts share with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill." (Citations omitted.) *Schlesinger* v. *Councilman*, —— U.S. —— (No. 73-662, March 25, 1975), 43 L.W. 4432.

The state courts of New York having held that local ordinances adopted pursuant to Section 245.01 of the State Penal Law are constitutional, this Court should reverse the United States Court of Appeals for the Second Circuit and remit this matter to the state courts for determination and disposition.

CONCLUSION

Local Law No. 1 of 1973 of the Town of North Hempstead is constitutional and the decision of the United States Court of Appeals for the Second Circuit should be reversed and the relief requested by the appellants be granted.

Respectfully submitted,

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